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No.

In the Supreme Court of the United States

GEORGE E. SNYDER, WARDEN, PETITIONER

v.

MARIO ROSALES-GARCIA

RANDY J. DAVIS, WARDEN, AND BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, PETITIONERS

v.

REYNERO ARTEAGA CARBALLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted 8 U.S.C. 1231(a)(6) to limit the detention of permanent resident aliens following final orders directing their removal from the United States, thereby avoiding constitutional concerns. The Court held that a resident alien may not be detained under Section 1231(a)(6) for more than six months after being ordered removed, if the alien demonstrates that there is not a significant likelihood of removal in the reasonably foreseeable future, and no special circumstances warrant continued detention. The Court distinguished *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), which held that indefinite detention of an alien *who has not gained entry into the United States*, pending the alien's removal from the United States, does not violate due process. The questions presented are:

1. Whether the six-month rule of *Zadvydas* applies to respondents, who are inadmissible aliens apprehended at the border of the United States, and who have been ordered excluded from the United States.

2. Whether, as the court of appeals believed, this Court has implicitly overruled *Mezei*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of George E. Snyder, Warden of the Federal Medical Center in Lexington, Kentucky; Randy J. Davis, Warden of the Federal Correctional Institution in Memphis, Tennessee; and the Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security,[1] respectfully petitions for a writ of certiorari to

[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former Immigration and Naturalization Service (which respondent Carballo named as a respondent in his habeas corpus petition), were transferred to the Department of Homeland Security and assigned to its Bureau of

review the judgment of the United States Court of Appeals for the Sixth Circuit in these cases, which the court of appeals consolidated for oral argument en banc.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-64a) is reported at 322 F.3d 386. The orders of the district courts (App., *infra*, 170a-192a, 195a-200a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Relevant constitutional, statutory, and regulatory provisions are set out in an appendix to this petition. App., *infra*, 203a-211a.

STATEMENT

Respondents were among approximately 125,000 Cuban nationals, many of them convicted criminals in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift. After Cuba refused to accept the return of Mariel Cubans who were stopped at the border and denied entry into the United States, the Attorney General, through the Immigration and Naturalization Service (INS), soon paroled all but a few hundred of those Cubans into this country pursuant to 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980). See generally *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578-579

Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (codified at 6 U.S.C. 251(2)).

(11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101-102 (4th Cir. 1982). Section 1182(d)(5)(A) then authorized, and as amended continues to authorize, the Attorney General to parole aliens applying for admission to the United States into the country temporarily on conditions he prescribes, but provides that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General, the purposes of the alien's parole have been served, the alien shall forthwith be returned to custody "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

In 1984, the United States and Cuba reached an accord concerning immigration between the two countries, including the return of 2746 specified individuals with serious criminal backgrounds or mental infirmities. See Immigration Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, *available at* 1984 WL 161941. Approximately 1630 Mariel Cubans have been repatriated to Cuba under the 1984 accord. Repatriations most recently occurred in January and March 2003.

Pursuant to Section 1182(d)(5)(A), the Attorney General promulgated regulations in 1987 governing the parole and revocation of parole of any Mariel Cuban (defined to include any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980) pending either an exclusion hearing or his or her return to Cuba or another country. See 8 C.F.R. 212.12; 52 Fed. Reg. 48,802 (1987). Those regulations supplement the general regulations governing the parole and release of aliens who are seeking admission to the United States. See 8 C.F.R. 212.5, 241.4.

In 1990, Congress added new a new statutory provision, 8 U.S.C. 1226(e) (1994), which imposed limitations on the Attorney General's power to grant parole to excludable aliens. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(b), 104 Stat. 5050. Section 1226(e)(1) provided that, pending a determination of excludability, the Attorney General "shall take into custody" any alien convicted of an aggravated felony. 8 U.S.C. 1226(e)(1) (1994). Section 1226(e)(2) and (3) then provided that the Attorney General "shall not release such felon from custody" unless the Attorney General determined under 8 U.S.C. 1253(g) (1994) that the alien's country of removability would not accept his return and, *inter alia*, the Attorney General concluded, after review of the alien's request for relief and the severity of the alien's felony, that "the alien will not pose a danger to the safety of other persons or to property." 8 U.S.C. 1226(e)(2) and (3) (1994). Section 1226(e) otherwise left unaffected the Attorney General's discretion to grant or revoke parole under Section 1182(d)(5)(A).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, Congress added a new Section 1231 to Title 8 of the United States Code. Section 1231(a)(1) requires the detention for 90 days of aliens who have been ordered removed from the United States (including aliens who have been stopped at the border and were regarded as "excludable" under prior law).[2] Section 1231(a)(6) then provides that an alien

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[2] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982); 8 U.S.C. 1182

ordered removed who is inadmissible under 8 U.S.C. 1182 or deportable for the commission of a specified crime, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, "may be detained beyond the [90-day] removal period." See *Zadvydas* v. *Davis*, 533 U.S. 678, 682, 688-689 (2001).

1. Rosales-Garcia

a. Respondent Rosales-Garcia was apprehended at the border in May 1980, and prevented from entering the United States. App., *infra*, 3a-4a, 67a. On May 20, 1980, the INS granted Rosales-Garcia temporary immigration parole pursuant to 8 U.S.C. 1182(d)(5)(A). App., *infra*, 5a, 67a. In September 1981, while on immigration parole, Rosales-Garcia committed grand theft, for which he was sentenced to two years' probation. In October 1981, while still on immigration parole, Rosales-Garcia was convicted of marijuana possession and resisting arrest and sentenced to probation. *Id.* at 5a; C.A. App. 183 (No. 99-5683). In October 1983, while

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(1994). Aliens who had gained lawful admission to the United States or entered without permission were deportable. See 8 U.S.C. 1251 (1994). IIRIRA replaced the category of "excludable" aliens with the new and broader category of "inadmissible" aliens, consisting of aliens who are not eligible for admission into the United States. See 8 U.S.C. 1182. Under IIRIRA, an alien who enters the United States illegally has not been "admitted," and is inadmissible. 8 U.S.C. 1182(a)(6)(A). Accordingly, the new category of "inadmissible" aliens includes both aliens who have not entered the country (formerly known as "excludable" aliens) and aliens who entered without permission and formerly were deemed to be "deportable." In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-597, Congress instituted a new form of proceeding, known as "removal," that applies to inadmissible aliens as well as deportable aliens. See 8 U.S.C. 1229, 1229a.

still on immigration parole, he was convicted of burglary and grand larceny and sentenced to consecutive six-month sentences. In February 1984, while still on immigration parole, he was convicted of escaping from a penal institution and sentenced to 366 days' imprisonment. *Id.* at 5a.

In July 1986, after Rosales-Garcia completed his sentences, the INS revoked his immigration parole pursuant to 8 U.S.C. 1182(d)(5)(A) and 8 C.F.R. 212.5(d)(2) (1986), because it determined that his continued release into the community was against the public interest and that he should be detained pending exclusion proceedings. See App., *infra*, 6a. The INS commenced exclusion proceedings by charging Rosales-Garcia with being excludable under, *inter alia*, 8 U.S.C. 1182(a)(20) (1982), as an alien not in possession of an immigrant visa or other valid entry document. In June 1987, an immigration judge determined that Rosales-Garcia is excludable, denied his request for asylum, and ordered his removal from the United States. App., *infra*, 68a-69a. The United States has not been able to remove Rosales-Garcia because Cuba has not agreed to accept his return. *Id.* at 5a.

In May 1988, the INS released Rosales-Garcia on immigration parole for the second time. App., *infra*, 6a. In March 1993, Rosales-Garcia was convicted in federal court of conspiring to possess cocaine with intent to distribute it. He was sentenced to 63 months' imprisonment, followed by five years' supervised release. *Id.* at 5a-6a.

In March 1997, the Attorney General revoked Rosales-Garcia's second immigration parole because of the 1993 conviction. App., *infra*, 69a. Accordingly, when Rosales-Garcia was released from federal prison in May 1997, he was returned to INS custody. *Id.* at 6a.

As required by the parole regulations applicable to Mariel Cubans, see 8 C.F.R. 212.12(g), the INS reviewed Rosales-Garcia's custody status annually. He was denied re-parole in 1998 and 1999. App., *infra*, 6a, 70a-71a, 171a-172a. In May 2000, however, the INS determined that Rosales-Garcia was releasable under the regulations, see 8 C.F.R. 212.12(d), and he was placed in a halfway house. App., *infra*, 71a n.7. Rosales-Garcia completed that program in May 2001 and was paroled into the community under conditions of supervision. *Id.* at 6a.

b. Meanwhile, in July 1998, Rosales-Garcia filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the Eastern District of Kentucky, claiming in relevant part that the revocation of his second parole in March 1997 and his continued detention violated due process. App., *infra*, 6a, 172a. In May 1999, the district court dismissed the petition. *Id.* at 170a-194a. The court believed that Rosales-Garcia's detention was subject to 8 U.S.C. 1231(a), even though that provision was enacted after his exclusion proceedings were completed. App., *infra*, 184a. On that premise, the court concluded (*id.* 181a-187a) that after an order of removal has been entered against an alien stopped at the border, detention beyond the 90-day removal period is authorized by that statute.

The district court rejected Rosales-Garcia's due process challenge to his detention. The court found "no basis" for Rosales-Garcia's claim to have a liberty interest in being released into the United States, App., *infra*, 187a, and observed that "the law is clear that excludable aliens" in Rosales-Garcia's position "have only the procedural due process rights afforded by Congress," *id.* at 188a. See *id.* at 187a-189a (discussing, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), and *United*

States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). The court determined that Rosales-Garcia had received the full process to which he was entitled under the immigration laws and the 1987 administrative regulations that assure detained Mariel Cubans annual parole reviews. *Id.* at 190a-191a; see *id.* at 205a-211a (reproducing relevant regulations).

c. In January 2001, a divided panel of the United States Court of Appeals for the Sixth Circuit reversed. App., *infra*, 65a-139a. As a threshold matter, the court of appeals held that the INS's intervening decision to place Rosales-Garcia in a halfway house, as a step toward a third parole, did not render the case moot. *Id.* at 79a-83a.

The panel next determined (App., *infra*, 84a-85a) that Rosales-Garcia's detention is governed by 8 U.S.C. 1226(e) (1994), rather than the current 8 U.S.C. 1231(a)(6) as the district court believed. The panel reasoned that Rosales-Garcia was ordered excluded, and his immigration parole was last revoked, before the April 1, 1997, effective date of IIRIRA, see Pub. L. No. 104-208, § 309(c)(1), 110 Stat. 3009-625, which added the new 8 U.S.C. 1231. The panel determined that former Section 1226(e) provided unambiguous statutory authority for Rosales-Garcia's detention. App., *infra*, 85a-87a.

Turning to whether Rosales-Garcia's statutorily authorized detention violated due process, the panel determined, in disagreement with the district court, that indefinite detention of an excludable alien would implicate a liberty interest protected by the Fifth Amendment. App., *infra*, 91a-98a. The panel further concluded that, although Rosales-Garcia's continued detention was rationally related to the government's non-punitive interest in protecting society, the deten-

tion was unconstitutionally excessive because it was indefinite in duration. *Id.* at 99a-111a. The panel stated that the automatic annual review afforded under administrative regulations "does not affect the nature of [Rosales-Garcia's] detention as indefinite," *id.* at 108a, because he "can never be certain of receiving such parole," *id.* at 109a.

District Judge Rice, sitting by designation, dissented. In his view, excludable aliens such as Rosales-Garcia can claim no liberty interest in being free from detention in the United States and, even if a liberty interest is implicated, detention with annual parole reviews is not excessive in relation to the government's non-punitive purposes of enforcing the immigration laws and protecting public safety. App., *infra*, 112a-139a.

d. In June 2001, this Court decided *Zadvydas* v. *Davis*, 533 U.S. 678, which addressed the legality of the continued detention under 8 U.S.C. 1231(a)(6) of aliens who were admitted to the United States as permanent resident aliens, and later ordered removed, but who could not be removed within the 90-day statutory removal period. The Court construed Section 1231(a)(6) "to contain an implicit 'reasonable time' limitation." 533 U.S. at 682. In particular, to avoid a serious constitutional question, the Court construed the Attorney General's authority to detain the former permanent resident aliens under Section 1231(a)(6) to be limited to the period of time reasonably necessary to remove them from the United States. 533 U.S. at 689. "[F]or the sake of uniform administration," the Court further determined that detention for a period of six months is presumptively reasonable. *Id.* at 701. After that presumptively reasonable period, if "the alien provides good reason to believe that there is no significant likeli-

hood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Ibid.*

The Court emphasized in *Zadvydas* that "[a]liens who have not yet gained initial admission to this country would present a very different question," which was not before the Court. 533 U.S. at 682. Furthermore, in its analysis of the potential constitutional problem posed by detention of deportable permanent resident aliens, the Court rejected the United States' reliance on *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). In *Mezei*, the Court had held that ongoing detention of an alien who unsuccessfully sought entry into the United States but could not be removed did not violate due process. See 345 U.S. at 210-216. In *Zadvydas*, the Court stated that *Mezei* "differs from [*Zadvydas*] in a critical respect," because Mezei's detention on Ellis Island was a continuation of his exclusion and did not count as a successful entry into the United States. 533 U.S. at 693. The Court noted that aliens stopped at the border remain applicants seeking initial admission to the United States even if they are physically present in the country. *Ibid.* (citing *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925), and *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190 (1958)). Mezei's legal status as an excludable alien at the border, the Court explained in *Zadvydas*, "made all the difference." *Ibid.*

e. After *Zadvydas*, the government petitioned for a writ of certiorari in the *Rosales-Garcia* case, requesting that the Sixth Circuit's panel decision be vacated and remanded in light of *Zadvydas* and its discussion of *Mezei*. See Pet. at 14-22, *Thoms* v. *Rosales-Garcia*, No. 01-285 (filed Aug. 15, 2001). The government noted that a remand also would allow the court of appeals to reconsider its determination that the case was not

moot, because Rosales-Garcia had completed his halfway house program after the court of appeals issued its decision. *Id.* at 22.

On December 10, 2001, this Court granted the government's petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Zadvydas*. 534 U.S. 1063.

2. Carballo

a. Like Rosales-Garcia, respondent Carballo is a Mariel Cuban who was apprehended at the border in May 1980. App., *infra*, 5a, 145a. The INS detained Carballo but soon granted him immigration parole. *Id.* at 7a, 145a. In April 1983, after having been arrested 16 times, Carballo was convicted of attempted first-degree murder, aggravated assault with a deadly weapon, and robbery. *Id.* at 7a-8a. He was sentenced to concurrent prison sentences of eight years for attempted murder, five years for aggravated assault, and eight years for robbery. *Id.* at 8a; C.A. App. 96, 107-109 (No. 99-5698).

In November 1983, the INS revoked Carballo's immigration parole. App., *infra*, 196a. In June 1988, when Carballo was released from prison, the INS took him into custody. *Id.* at 8a. In September 1994, an immigration judge ordered Carballo excluded from the United States for not possessing a valid entry document, 8 U.S.C. 1182(a)(7)(A)(i)(I) (1994), and for having been convicted of a crime involving moral turpitude and multiple offenses for which the sentence to confinement was five years or more, 8 U.S.C. 1182(a)(2)(A)(i)(I), (a)(2)(B) (1994). App., *infra*, 8a.

Carballo "developed a sizable disciplinary record" while in immigration custody. App., *infra*, 146a. The INS denied Carballo release in several annual parole reviews but, in December 2002, paroled him to a nine-

month, residential substance-abuse program. *Id.* at 8a, 146a.

b. Meanwhile, in December 1998, Carballo filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the Western District of Tennessee. Carballo challenged the Attorney General's statutory and constitutional authority to detain him, and asserted that his continued detention violates international law. App., *infra*, 8a, 199a. Carballo had presented similar claims in 1990, in a habeas corpus petition that the United States District Court for the Northern District of Texas denied. *Id.* at 8a-9a. In May 1998, the Tennessee district court denied Carballo's second petition under the law-of-the-case doctrine. *Id.* at 195a-200a.

c. In October 2001, a Sixth Circuit panel affirmed the denial of Carballo's second habeas petition, on the ground that it was barred as a successive petition. App., *infra*, 140a-169a.

In particular, the court determined that the January 2001 panel decision in *Rosales-Garcia*, which had not yet been vacated by this Court, did not constitute an intervening change in the law that would allow consideration of Carballo's second petition on the merits. App., *infra*, 163a-169a. Like the *Rosales-Garcia* panel, the *Carballo* panel determined that 8 U.S.C. 1226(e) (1994), rather than 8 U.S.C. 1231(a)(6), authorized the detention. See App., *infra*, 155a-158a. But the *Carballo* panel further determined that the *Rosales-Garcia* panel's conclusion that excludable aliens have a protected liberty interest in freedom from detention "cannot survive the Supreme Court's decision in *Zadvydas*[,] and that under the analysis of *Mezei* the Fifth Amendment does not present an obstacle to the potentially indefinite detention of an excludable alien."

Id. at 169a. Accordingly, the panel determined that there had been no material change in the law since Carballo's first habeas corpus petition was denied, and that the second petition is a prohibited successive petition. *Ibid.*

3. The Consolidated En Banc Proceeding

In November 2001, the court of appeals entered a *sua sponte* order vacating the panel decision in *Carballo* and ordering that the case be reheard en banc. App., *infra*, 201a-202a. After this Court vacated the panel decision in *Rosales-Garcia* and remanded for further consideration in light of *Zadvydas*, *Rosales-Garcia* was consolidated with *Carballo* for argument before the Sixth Circuit en banc. *Id.* at 7a. A divided en banc court of appeals reversed the district courts' denials of both habeas corpus petitions. *Id.* at 1a-64a.[3]

a. At the outset, the court rejected the government's argument that the INS's parole of Rosales-Garcia into the community mooted his habeas petition. Stating that Rosales-Garcia's parole "can be revoked by the INS at any time for almost any reason," App., *infra*, 13a (citing 8 C.F.R. 212.12(b)(1) and (h)), the court concluded that Rosales-Garcia's parole is a "reprieve from detention" rather than "a termination of detention" and, furthermore, that Rosales-Garcia is "threatened with an actual injury traceable to [the government] and likely to be redressed by a favorable judicial decision," *id.* at 13a-14a. The court of appeals also relied on the exceptions to mootness that address the

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[3] The en banc court correctly determined that it had jurisdiction to consider respondents' habeas corpus petitions despite statutory limitations on review of administrative actions taken under the immigration laws. See App., *infra*, 10a (citing *INS* v. *St. Cyr*, 533 U.S. 289, 298-314 (2001), and *Zadvydas*, 533 U.S. at 688).

defendant's voluntary cessation of the challenged conduct, and conduct that is capable of repetition, yet evading review. *Id.* at 14a-17a.

The court of appeals likewise determined that Carballo's habeas corpus petition is not barred as a successive petition, because, as the court held later in its opinion, *Zadvydas* changed the relevant law. App., *infra*, 17a-23a.

b. Addressing the habeas petitions on the merits, the en banc court first determined that any statutory basis for respondents' detention is found in 8 U.S.C. 1231(a)(6), which was enacted in 1996 as part of IIRIRA. In holding that current Section 1231(a)(6) applies, the court of appeals relied primarily (App., *infra*, 26a-27a) upon *INS* v. *St. Cyr*, 533 U.S. 289 (2001). This Court stated in *St. Cyr* that a provision of IIRIRA that generally makes IIRIRA's amendments inapplicable to aliens, like respondents, who were placed in exclusion or deportation proceedings before April 1, 1997, "is best read as merely setting out the *procedural* rules to be applied to removal proceedings pending on the effective date of the statute." 533 U.S. at 318 (discussing IIRIRA § 309(c), 110 Stat. 3009-625). Because respondents' challenge here is to their detention after final exclusion orders were entered against them, as distinguished from the conduct of the exclusion proceedings themselves, the court of appeals concluded that the IIRIRA effective-date provision discussed in *St. Cyr* does not apply and current law should govern. App., *infra*, 27a-28a.

c. The court of appeals next concluded that, even though respondents are excludable aliens who were denied admission at the border, the limiting construction of 8 U.S.C. 1231(a)(6) that this Court set forth in *Zadvydas* controls their detention. The court of

appeals stated that it did "not believe that the Supreme Court intended to construe § 1231(a)(6) differently for aliens [like respondents] who are removable on grounds of inadmissibility and aliens [like the permanent resident aliens in *Zadvydas*] who are removable on grounds of deportability." App., *infra*, 32a.

The court of appeals acknowledged that the six-month rule of *Zadvydas* responded specifically to "the constitutional concerns raised by the indefinite detention of aliens who are removable on grounds of deportability," as opposed to aliens who are denied admission at the border. App., *infra*, 33a. But the court of appeals found it critical (*id.* at 31a-32a, 37a) that Section 1231(a)(6) does not make an express distinction between aliens stopped at the border and aliens ordered deported after entering the United States.

The court of appeals thus concluded that respondents "may * * * take advantage of" *Zadvydas*'s statutory interpretation even if their own cases "do[] not present the constitutional problem that prompted the statutory interpretation." App., *infra*, 34a (quoting *Lin Guo Xi* v. *INS*, 298 F.3d 832, 839 (9th Cir. 2002)). In extending *Zadvydas*'s holding in that manner, the court relied in part on the fact that IIRIRA changed immigration-law nomenclature by establishing a new class of "inadmissible" aliens that includes (but is not limited to) aliens denied admission at the border, who formerly were known as "excludable" aliens. See note 2, *supra*. In the court of appeals' view (*id.* at 35a-37a), the absence from Section 1231(a)(6) of any specific reference to post-removal-period detention of those inadmissible aliens who formerly would have been deemed "excludable" suggests that those aliens should be subject to the same rules that *Zadvydas* articulated for post-final-order detention of resident aliens.

d. The court of appeals acknowledged that "it is not completely clear from * * * *Zadvydas* how the Court intended its statutory analysis to be applied." App., *infra*, 38a; see *id.* at 43a ("[W]e recognize that the *Zadvydas* Court left open the question whether the indefinite detention of excludable aliens raises the same constitutional concerns * * * as the indefinite detention of aliens who have entered the United States."). But the court then stated that, regardless of the correctness of its extension of the statutory holding in *Zadvydas*, "constitutional concerns would independently compel us to construe IIRIRA's post-removal-period detention provision to contain a reasonableness limitation for excludable aliens." *Id.* at 38a.

In support of that alternative holding, the court of appeals expressed "vehement[]" disagreement (App., *infra*, 40a) with the proposition that constitutional due process principles are not implicated when the government detains an alien who has been stopped at the border while seeking to enter the United States illegally. The court of appeals stated that although such excluded aliens have not achieved entry into the country as a matter of law, see *Zadvydas*, 533 U.S. at 693, they nevertheless are "persons living in the United States" who "*must*" be able to invoke due process protections against their "treatment" by the government. App., *infra*, 42a

The court of appeals further reasoned that "[i]f the Due Process Clause of the Fifth Amendment applies to [respondents], as we believe that it must, we do not see how we could conclude that the indefinite and potentially permanent detention of [respondents] raises any less serious constitutional concerns than the indefinite and potentially permanent detention of the aliens in *Zadvydas*." App., *infra*, 47a. In particular, the

court rejected the government's argument that respondents may be detained to enforce the sovereign right of preventing their entry into the United States. See *Mezei*, 345 U.S. at 210, 215-216. According to the court of appeals (App., *infra*, 47a), conditional immigration parole provides a *constitutionally compelled* alternative to detention when the alien cannot be returned to his country of origin after being denied admission.

The contrary holding of *Mezei*, the court of appeals said, "does not govern" respondents' detention because (1) in the court of appeals' view, *Mezei* was "grounded * * * in the special circumstances of" the Cold War and Korean conflict and a "determination by the Attorney General that Mezei presented a threat to national security," App., *infra*, 49a-50a & n.33, and (2) *Mezei* has been "eclipsed" (*id.* at 50a) and "fatally undermined by" (*id.* at 52a) *United States* v. *Salerno*, 481 U.S. 739 (1987), and other cases that have limited civil detention outside the immigration area.

For those reasons, the court invoked the canon of constitutional avoidance to construe Section 1231(a) to place precisely the same limitation on detention of respondents, who have been excluded from entry into the United States, as *Zadvydas* placed on detention of permanent resident aliens who have been found to be deportable. App., *infra*, 52a-53a. Finding "no significant likelihood that [respondents] will be removed in the reasonably foreseeable future[,] and because the INS has detained them longer than six months," the court of appeals "conclude[d] that the INS's detention of [respondents] is no longer reasonable and is therefore not authorized by IIRIRA's post-removal-period detention provision." *Id.* at 53a.

e. Judge Boggs, joined by Judges Krupansky and Batchelder, dissented. App., *infra*, 54a-64a. The three

dissenting judges stated that the majority's due process analysis "cannot be derived from the text of the Constitution and is contrary to [*Mezei*], which the Supreme Court [in *Zadvydas*] has recently explicitly relied on and refused to overrule." *Id.* at 54a. They also noted (*id.* at 57a-58a) that the Sixth Circuit's approach conflicts with decisions of other circuits, and effects "a disabling of congressional policy choices" (*id.* at 60a) about who should be allowed into United States territory.

The dissenting judges found it "remarkabl[e]" to apply IIRIRA, which "tighten[ed] immigration regulations," in a way that gives excludable aliens a newfound entitlement to release from detention. App., *infra*, 61a. They further deemed it "a natural consequence" (*id.* at 63a) of *Zadvydas*'s reliance on the constitutional-avoidance canon that Section 1231(a)(6) should be applied differently to deportable aliens (as to whom this Court found a serious constitutional question) than to aliens stopped at the border (as to whom no such question exists under *Mezei*). See *id.* at 61a-64a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's extension of the six-month rule of *Zadvydas* v. *Davis*, 533 U.S. 678 (2001)—from the context of deportable former permanent resident aliens presented in *Zadvydas* to the context of excludable aliens stopped at the border while attempting to enter illegally—is incorrect, deepens a circuit split, and has great practical importance. Furthermore, the Sixth Circuit made a fundamental error of constitutional law when it determined, in conflict with *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), and decisions of every other circuit to address the question,

that due process principles entitle respondents to be released into the United States. This Court's review is warranted to establish the correct application of *Zadvydas* to aliens detained after being stopped at the border, and to correct the court of appeals' erroneous due process holding.[4]

1. a. The lower courts are divided about whether *Zadvydas*'s finding of an implied limitation on detention under 8 U.S.C. 1231(a)(6), which was prompted by constitutional doubt about the lawfulness of indefinite detention of permanent resident aliens who were ordered deported, applies to aliens who have been stopped at the border and denied admission to the United States. In the decision below, the en banc Sixth Circuit held, over a dissent, that *Zadvydas*'s six-month rule applies to respondents as excludable aliens. Similarly, in *Lin Guo Xi* v. *INS*, 298 F.3d 832 (2002), a Ninth Circuit panel held, over a dissent, "that *Zadvydas* applies to inadmissible individuals," *id.* at 836; see *id.* at 840-843 (Rymer, J., dissenting).

Those Sixth and Ninth Circuit decisions conflict with *Rios* v. *INS*, No. 02-40766, 2003 WL 734159 (5th Cir. Jan. 28, 2003) (per curiam) (designated for publication).

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[4] The government's position, argued below, is that respondents' detention is affirmatively authorized by, *inter alia*, 8 U.S.C. 1226(e) (1994), and that current Section 1231(a)(6) does not apply to respondents. The court of appeals rejected that argument, App., *infra*, 23a-28a, and this petition does not seek further review of that issue. However, as explained below, Section 1231(a)(6) does not impose a limit on the detention of aliens who were stopped at the border and are detained under that section, and it does not limit the independent authority of the Bureau of Immigration and Customs Enforcement under 8 U.S.C. 1182(d)(5)(A) to decide, in its discretion, whether to grant parole to (or revoke the parole of) an alien who has been stopped at the border. See pp. 21-26, *infra*.

In *Rios*, a Mariel Cuban who was stopped at the border in 1980 challenged his detention after revocation of parole on the basis that it violates his constitutional rights and is not authorized by statute. The Fifth Circuit upheld the ongoing detention, emphasizing that *Zadvydas* "distinguished the status of deportable aliens from that of excludable aliens." 2003 WL 734159, at *1. Similarly, the Tenth Circuit has stated after *Zadvydas* that Section 1231(a)(6) preserves the discretion of the Attorney General (now exercised by the Bureau of Immigration and Customs Enforcement, see note 1, *supra*) whether to deny immigration parole to an excluded Mariel Cuban. *Sierra* v. *INS*, 258 F.3d 1213, 1219 (10th Cir.), cert. denied, 534 U.S. 1071 (2001).[5]

District courts in other circuits also disagree about whether the rule of *Zadvydas* applies to aliens who

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[5] Unlike these consolidated cases, the Ninth Circuit's decision in *Lin Guo Xi* and the Fifth Circuit's decision in *Rios* both involved detention of aliens who were placed in removal proceedings under IIRIRA, and therefore were "inadmissible," in IIRIRA's terminology, rather than "excludable." See *Lin Guo Xi*, 298 F.3d at 834; *Rios*, 2003 WL 734159, at *1 (noting that Rios was taken into INS custody in 1998); see also note 2, *supra*. That difference does not lessen the conflict among the circuits. The Sixth Circuit in this case specifically found *Zadvydas*'s interpretation of Section 1231(a)(6) applicable to "aliens who are removable on grounds of inadmissibility," App., *infra*, 31a, 32a, 35a, 36a, and "agree[d] with" the Ninth Circuit that *Zadvydas*'s interpretation of Section 1231(a)(6) is "unqualified," *id.* at 33a (quoting *Lin Guo Xi*, 289 F.3d at 836). For its part, the Fifth Circuit in *Rios* used the term "excludable alien" synonymously with "inadmissible alien," see 2003 WL 734159, at *1, and viewed *Zadvydas* as being limited to the detention of deportable aliens, *ibid.* Therefore, the circuits are in direct disagreement about whether *Zadvydas*'s interpretation of Section 1231(a)(6) applies to aliens who have been stopped at the border and denied admission to the United States.

have been denied entry to the United States. Compare, *e.g.*, *Herrero-Rodriguez* v. *Bailey*, 237 F. Supp. 2d 543, 547-551 (D.N.J. 2002) (*Zadvydas* inapplicable to detention of excludable Mariel Cuban); *Soto-Ramirez* v. *Ashcroft*, 228 F. Supp. 2d 566, 570-572 (M.D. Pa. 2002) (same), appeal pending, No. 02-4145 (3d Cir. docketed Nov. 14, 2002); *Morales* v. *Conley*, 224 F. Supp. 2d 1070, 1074-1075 (S.D. W. Va. 2002) (same), with *Borrero* v. *Aljets*, 178 F. Supp. 2d 1034, 1039-1044 (D. Minn. 2001) (applying *Zadvydas* to detention of inadmissible Mariel Cuban), appeal pending, No. 02-1506 (8th Cir. argued Dec. 11, 2002).

b. The Sixth and Ninth Circuits' extension of *Zadvydas* is incorrect. *Zadvydas* addressed only Section 1231(a)(6)'s application to "aliens who were admitted to the United States but subsequently ordered removed." 533 U.S. at 682. The Court noted that detention of "[a]liens who have not yet gained initial admission to this country would present a very different question." *Ibid.* Moreover, in distinguishing *Mezei*, the Court observed that, even if aliens stopped at the border are paroled into the United States, they remain as a matter of law applicants seeking initial admission to the United States. *Id.* at 693 (citing cases). And the Court reaffirmed that there is a "critical" distinction between detention of aliens stopped at the border and detention of deportable aliens who have entered the United States—a distinction that makes "all the difference" for purposes of constitutional analysis. *Ibid.* Thus, as the Ninth Circuit acknowledged in *Lin Guo Xi*, 298 F.3d at 839, ongoing detention of aliens stopped at the border, who cannot be removed from the United States because no country will accept them, does not present the "constitutional problem," 533 U.S. at 696, that underlay

the Court's construction of Section 1231(a)(6) in *Zadvydas*.

The canon of constitutional avoidance, which supported the Court's inference of an unarticulated statutory limitation on the detention of the aliens before the Court in *Zadvydas*, therefore does not support the application of a similar non-textual limitation on respondents' detention. By its plain terms, 8 U.S.C. 1231(a)(6) states that the Attorney General "may" detain specified aliens beyond the 90-day statutory removal period, and does not limit the duration of that detention. The statutory language "suggests discretion," *Zadvydas*, 533 U.S. at 697, and "literally * * * sets no limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained," *id.* at 689 (internal quotation marks omitted). The constitutional-avoidance canon is grounded in "respect for Congress" and "minimize[s] disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). Accordingly, the canon should not be applied to create an *avoidable* inconsistency with congressional intent as manifested in the ordinary reading of statutory language. Yet that very sort of avoidable friction between the Judicial and Legislative Branches is the direct result of "read[ing] an implicit limitation into the statute" (*Zadvydas*, 533 U.S. at 689) with respect to the category of aliens at issue here, because there is no due process problem when Section 1231(a)(6) is applied to those aliens in accordance with its terms. See, *e.g.*, App., *infra*, 61a-63a (Boggs, J., dissenting); *Lin Guo Xi*, 298 F.3d at 841-842 (Rymer, J., dissenting).

The dissenting Justices in *Zadvydas* expressed concern that consistency might dictate extending *Zadvydas*'s interpretation of Section 1231(a)(6) to "inadmissible aliens, for instance those stopped at the border before entry." 533 U.S. at 710 (Kennedy, J., dissenting). But even under that view, *Zadvydas* would not require respondents' release. In the context of deportable resident aliens, *Zadvydas* construed Section 1231(a)(6) as having "an implicit 'reasonable time' limitation," *id.* at 682, that is best administered by establishing a rebuttable presumption that detention for more than six months is unreasonable if the alien shows that removal is not foreseeable. See *id.* at 696-702. The Court was clear that the statute itself does not establish a six-month limitation on post-final-order detention of any alien. See *id.* at 701. Therefore, if *Zadvydas*'s construction of Section 1231(a)(6) did apply to respondents and other aliens stopped at the border, there would be a "reasonable time" limitation on their detention, but it would not follow that the implied "reasonable time" limitation should be implemented through a six-month presumption. The Court's rationale for adopting such a presumption in *Zadvydas* does not apply to aliens who are stopped at the border and denied admission.

The Court explained in *Zadvydas* that detention of an alien becomes problematic under the Due Process Clause of the Fifth Amendment when it "no longer bears a reasonable relation to the purpose for which the individual was committed." 533 U.S. at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972)) (internal brackets and quotation marks omitted). The Court concluded that when a permanent resident alien has been ordered deported, the "basic purpose" of detention under Section 1231(a)(6) is "assuring the alien's pre-

sence" for his physical removal from the country. *Id.* at 699. Therefore, if removal is not foreseeable, prolonged detention of a deportable resident alien raises serious constitutional questions unless it is justified by other considerations, such as protecting the community against the alien's commission of other crimes. *Id.* at 699-700.

Unlike detention of deportable resident aliens, detention of aliens who have been stopped at the border and ordered excluded effectuates the government's interest in preventing the aliens' unlawful physical presence in the United States *in the first place.* The exclusion orders entered against respondents constitute determinations that respondents have not been, and should not be, allowed to enter the United States. Respondents' continued detention thus serves directly the political Branches' exercise of the fundamental sovereign power to exclude aliens. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). As the Court said in *Mezei*, exclusion is "a fundamental sovereign attribute exercised by the Government's political departments," and the admission of an excluded alien may "nullif[y] the very purpose of the exclusion proceeding." 345 U.S. at 210, 216.

Under the analysis of *Zadvydas*, the detention of aliens stopped at the border and denied entry therefore is reasonable and permissible beyond the six-month period that was established for administrative convenience in *Zadvydas*, see 533 U.S. at 701. Indeed, applying the six-month rule to aliens stopped at the border would lead to the judicially compelled release of excludable aliens into the United States, creating precisely the "unprotected spot in the Nation's armor" that *Zadvydas* expressly disavowed. *Id.* at 695-696 (quoting *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 602

(1953)); see *Lin Guo Xi*, 298 F.3d at 842 (Rymer, J., dissenting).

The court of appeals' application of *Zadvydas*'s six-month rule to respondents also conflicts with the parole provisions of 8 U.S.C. 1182(d)(5) and longstanding policy regarding Mariel Cubans. Section 1182(d)(5)(A), which authorizes the temporary parole into the United States of aliens who are applying for admission, as well as the revocation of such parole, makes both the grant of parole and its revocation entirely discretionary.[6] Nothing in Section 1231(a)(6)—including any implicit limitation stated in *Zadvydas*—displaces that independent authority to parole or revoke the parole of aliens, like respondents, who have been stopped at the border. By contrast, in the case of the former lawful permanent residents in *Zadvydas*, there was no independent statutory basis for detention after the entry of a final order of removal.

It is nonsensical to read Section 1231(a)(6) as requiring the release of respondents into the community after they have been ordered excluded from the United States, when respondents could have been refused parole under Section 1182(d)(5)(A) while their exclusion proceedings were pending, and when Section 1182(d)(5)(A) expressly authorizes revocation of parole at *any* time when its purposes have been served. Furthermore, prior to the enactment of IIRIRA in 1996, the long-term detention of Mariel Cubans had

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[6] Aliens stopped at the border who have not been admitted to the United States are deemed for purposes of the immigration laws to be applicants for admission to the United States—even if they are physically present in the United States, and without regard to whether a removal order has been entered. 8 U.S.C. 1225(a)(1).

been upheld by numerous courts and had been the subject of congressional hearings. See *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1447-1448 & nn. 4,5 (9th Cir.), cert. denied, 516 U.S. 976 (1995). It is not plausible to conclude that Congress intended through new Section 1231(a)(6) to overturn the large body of judicial precedent upholding denials of parole to Mariel Cubans, see *Guzman* v. *Tippy*, 130 F.3d 64, 65 (2d Cir. 1997) (listing leading cases), yet failed to amend Section 1182(d)(5)(A) to restrict the Attorney General's discretion over parole decisions, and did not even mention such an important policy change in the legislative history of IIRIRA.

Respondents, moreover, do not face a "life sentence in prison," as the court of appeals imagined. App., *infra*, 48a. Detained aliens who have been ordered removed after being stopped at the border are entitled to annual custody reviews. See 8 C.F.R. 212.12(g) (Mariel Cubans), 241.4(k) (other aliens seeking admission). The rules applicable to respondents, for example, permit release on parole if it is determined that the alien is presently nonviolent, is likely to remain nonviolent, is not likely to pose a threat to the community following his release, and is not likely to violate the conditions of his parole. 8 C.F.R. 212.12(d)(2). Procedural safeguards protect against arbitrary denials of parole. 8 C.F.R. 212.12(b), (c), (d) and (g). Respondent Rosales-Garcia has obtained parole under those provisions, and respondent Carballo has obtained placement in a halfway-house treatment program.

c. The issue whether *Zadvydas* limits the detention of aliens who are stopped at the border has great importance for the enforcement of the Nation's immigration laws, foreign affairs, and national security. The Sixth and Ninth Circuit decisions require the release

into the United States of dangerous aliens to whom Congress and the Executive Branch have denied admission. Those decisions open a "back door" way into the United States for persons from nations with which the United States does not have full diplomatic relations, or that do not cooperate in repatriation of their nationals. That new, court-created avenue of unlawful entry will encourage illegal migration by inadmissible aliens from those countries. Cf. *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163-164, 187-188 (1993). If not closed by this Court, the resulting gap in immigration enforcement may prompt new steps to ensure that inadmissible aliens will not even reach United States soil, resulting in immigration policies that may be less generous to aliens than the policies that Congress and the Executive Branch have pursued under the framework of *Mezei*. Cf. *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 & n.20 (1976) (noting danger of "inhibit[ing] the flexibility of the political branches of government to respond to changing world conditions," and practical problems presented by extending new constitutional entitlements to large classes of aliens); *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958); *Mezei*, 345 U.S. at 215 ("While the Government might keep entrants by sea aboard their vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course.").

The Bureau of Immigration and Customs Enforcement of the Department of Homeland Security reports that it presently is detaining approximately 2057 arriving aliens who are under final orders of exclusion or removal. Approximately 1137 such arriving aliens, including 912 Mariel Cubans and 51 aliens currently within the boundaries of the Sixth Circuit, have been

detained for more than six months. The potential court-ordered release of those criminal aliens, whom the political Branches have determined should be denied entry into the United States and should not be released even under conditions of supervision, presents an immediate threat to public safety and implicates grave foreign policy and national security concerns.

2. This Court also should grant review to correct the Sixth Circuit's incorrect conclusion that *Mezei* has been "eclipsed" (App., *infra*, 50a) and "fatally undermined by" (*id.* at 52a) later decisions of this Court.[7] The court of appeals' determination that detention of aliens stopped at the border is subject to the same due process analysis as detention of permanent resident aliens or citizens, see *id.* at 43a-52a, conflicts with the unanimous view of other courts of appeals. See *Rios*, 2003 WL 734159, at *1; *Lin Guo Xi*, 298 F.3d at 837; *Hoyte-Mesa* v. *Ashcroft*, 272 F.3d 989, 991 (7th Cir. 2001), cert. denied, 123 S. Ct. 185 (2002); *Sierra*, 258 F.3d at 1218; *Kim Ho Ma* v. *Ashcroft*, 257 F.3d 1095, 1107-1109 (9th Cir. 2001); *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 395-398 (3d Cir. 1999); *Guzman*, 130 F.3d at 65-66; *Barrera-Echavarria* v. *Rison*, 44 F.3d at 1448-1450; *Gisbert* v. *United States Attorney Gen.*, 988 F.2d 1437, 1441-1444, amended, 997 F.2d 1122 (5th Cir. 1993); *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1450 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986); *Palma* v. *Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982). The Sixth Circuit's decision effectively establishes a constitutional right of entry

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[7] It is no obstacle to certiorari review of this issue that the Sixth Circuit's constitutional analysis of respondents' detention was an alternative ground for its holding. See, *e.g.*, *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924).

into the United States, which this Court has consistently rejected. See *Fiallo*, 430 U.S. at 792; *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972); *Mezei*, 345 U.S. at 210, 215-216.

The Court reaffirmed in *Zadvydas* that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law," and deemed it "well established that certain constitutional protections available to persons inside the United States are not available to aliens [legally treated as being] outside of our geographic borders." 533 U.S. at 693. Therefore, due process analysis "changes" when an alien enters the United States, "for the Due Process Clause applies to all 'persons' *within* the United States." *Ibid.* The Sixth Circuit's disregard for those fundamental principles has implications that reach far beyond the detention issue in this case, and independently warrants review by this Court.[8]

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[8] The government argued below that respondent Rosales-Garcia's habeas petition became moot when he was released on immigration parole. If respondent Carballo successfully completes the scheduled nine-month halfway-house treatment program in which he was placed in December 2002, see App., *infra*, 8a, then both of the consolidated cases might be moot under the position taken by the government below. The court of apeals, however, determined that release on parole under conditions does not moot an excludable Mariel Cuban's challenge to his detention. See *id.* at 11a-17a. Furthermore, the lower courts would benefit from this Court's consideration of the mootness issue if it is necessary to address the issue in this case. Compare *ibid.* (parole does not moot habeas challenge) with *Picrin-Peron* v. *Rison*, 930 F.2d 773, 776 (9th Cir. 1991) (parole of excludable Cuban moots habeas challenge to detention), and *Riley* v. *INS*, 310 F.3d 1253, 1256-1257 (10th Cir. 2002) (supervised release of INS detainee moots habeas claim in absence of evidence showing applicability of "voluntary cessation"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2003

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exception to mootness). The court of appeals' erroneous decision on the merits in this case is sufficiently important that its vacatur under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), if there were a future determination of mootness, would have significant benefit for the proper enforcement of the immigration laws. For those reasons, the possibility that a mootness issue may arise during the pendency of this Court's review does not counsel against granting the petition for a writ of certiorari.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-5683, 99-5698
D.C. Nos. 98-00286 & 98-03081

MARIO ROSALES-GARCIA, PETITIONER-APPELLANT

v.

J.T. HOLLAND, WARDEN, RESPONDENT-APPELLEE

REYNERO ARTEAGA CARBALLO,
PETITIONER-APPELLANT

v.

MARK LUTTRELL, WARDEN; IMMIGRATION AND
NATURALIZATION SERVICE, RESPONDENTS-APPELLEES

Appeal from the United States District Courts for the Eastern District of Kentucky at Lexington and the Western District of Tennessee at Memphis
Karl S. Forester, Chief District Judge and Julia S. Gibbons, District Judge.

Argued: March 20, 2002
Decided and Filed: March 5, 2003

Before: MARTIN, Chief Circuit Judge; KRUPANSKY, BOGGS, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which MARTIN, C. J., DAUGHTREY, COLE, CLAY, and GILMAN, JJ., joined. BOGGS, J. (pp. [54a-64a]), delivered a separate dissenting opinion, in which KRUPANSKY and BATCHELDER, JJ., joined.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Petitioners Mario Rosales-Garcia and Reynero Arteaga Carballo appeal the denials of their petitions for the writ of habeas corpus in the district courts. Both Petitioners, Cuban nationals who have been ordered removed from the United States, are currently in the indefinite and potentially permanent custody of the Immigration and Naturalization Service ("INS") because Cuba refuses to allow them to return. In its recent decision in *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001), the Supreme Court held that the provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") that authorizes the post-removal-period detention of removed aliens must be construed to contain an "implicit 'reasonable time' limitation" because the indefinite detention of aliens who are removable on grounds of deportability "would raise serious constitutional concerns."

We first conclude that Rosales's and Carballo's detention by the INS is governed by IIRIRA. We then conclude that although Rosales and Carballo are removable on grounds of inadmissibility, as opposed to deportability, the Supreme Court's limiting construc-

tion of IIRIRA's post-removal-detention provision applies to their detention. Finally, we conclude that even if the Supreme Court's construction of IIRIRA does not apply to Rosales and Carballo, their indefinite detention independently raises constitutional concerns, and we construe IIRIRA's post-removal-period detention provision as it applies to Rosales and Carballo to contain an implicit reasonable-time limitation. Because there is no significant likelihood of the petitioners' removal in the reasonably foreseeable future, the continued detention of the petitioners by the INS is not authorized by the applicable statute, and we **REVERSE** the district courts' denials of their habeas petitions and **REMAND** for proceedings consistent with this opinion.

I. BACKGROUND

Petitioners-Appellants Mario Rosales-Garcia ("Rosales") and Reynero Arteaga Carballo ("Carballo") arrived in this country as part of the Mariel boatlift in 1980, during which over 120,000 Cubans crossed by boat from the Mariel harbor in Cuba to the United States. Rosales and Carballo, like most of the Mariel Cubans, arrived in this country without documentation permitting them legal entry; therefore, because they were not authorized to enter the country and because immigration officials stopped them at the border, they were deemed "excludable" under the immigration law in effect at the time.[1] Although excludable aliens have

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") substantially altered the landscape in immigration law. "Among the changes brought by the IIRIRA was a shift in basic immigration terminology." *Chi Thon Ngo v. INS*, 192 F.3d 390, 395 n. 4 (3d Cir. 1999). Pre-IIRIRA, the law referred to "excludable" aliens, "those who were ineligible for admission or entry into the United States." *Id.; see also* 8 U.S.C.

not "entered" the country for the purposes of immigration law, Rosales and Carballo were permitted physical entry into the United States pursuant to the Attorney General's authority under 8 U.S.C. § 1182(d)(5)(A) (1982) to grant immigration parole.[2] As of 1986, this parole has been governed by regulations specifically promulgated by the INS for Mariel Cubans. 8 C.F.R. § 212.12 (2002) (the "Cuban Review Plan").

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§ 1182(a) (1994). "Excludable" aliens could be subject to exclusion proceedings; "'[d]eportation' proceedings, in contrast, were brought against those aliens who had gained admission into the country." *Chi Thon Ngo*, 192 F.3d at 395 n. 4; *see also* 8 U.S.C. §§ 1251(a), 1252 (1994). "The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission." *Landon v. Plasencia*, 459 U.S. 21, 25 (1982).

IIRIRA "refers to 'inadmissible' aliens[, 8 U.S.C. § 1182(a) (2000),] in the place of 'excludable' aliens. Although there are still separate grounds of 'inadmissibility' and 'deportability,' the distinction now turns on whether an alien has been 'admitted' to the United States, rather than on whether the alien has gained 'entry.'" *Chi Thon Ngo*, 193 F.3d at 395 n. 4. An alien who does not enter the United States legally is not "admitted." 8 U.S.C. § 1101(a)(13) (2000). "Inadmissible" aliens, therefore, include aliens who have not entered the United States (formerly excludable) and those who entered illegally (formerly deportable). 8 U.S.C. § 1182(a)(6) (2000). Both "inadmissible" and "deportable" aliens are now subject to removal proceedings. 8 U.S.C. § 1229a (2000).

[2] 8 U.S.C. §§ 1182(d) (1994) stipulates that "such parole of such alien shall not be regarded as an admission of the alien." *See also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993). This paradox of paroling aliens into the United States yet refusing to recognize their "entry" into the United States has been termed the "entry fiction" by some courts. *See, e.g., Gisbert v. Attorney General*, 988 F.2d 1437, 1440 (5th Cir. 1993).

Following their independent criminal convictions, the Attorney General, acting through the INS, revoked Rosales's and Carballo's parole and initiated exclusion proceedings against them. Both petitioners were excluded and, pursuant to the immigration law in effect at the time, they should have been immediately deported. Cuba, however, has refused to repatriate most of the Mariel Cubans whom the United States has excluded, and the U.S. government does not contend in this appeal that a repatriation by Cuba of either Rosales or Carballo is reasonably foreseeable.[3] Because Cuba refused to accept the deportation of either Rosales or Carballo, the INS has detained them in prisons in the United States.

A. Rosales

Rosales was twenty-three when he arrived in the United States, and he was soon thereafter paroled into the custody of his aunt. Beginning in 1980, Rosales was arrested for a number of offenses, including aggravated battery, possession of marijuana, burglary, and loitering. Rosales was convicted of the following offenses: possession of marijuana and resisting arrest in October 1981; grand theft in September 1981, for which he re-

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[3] According to the affidavit of James J. Carragher, the current Coordinator of the Office of Cuban Affairs in the State Department, Cuba agreed to repatriate 2,746 of the excluded Mariel Cubans in 1984. Rosales Supplemental Joint Appendix ("Rosales Supp. J.A.") at 1. As of January 2002, 1,589 of these individuals have been returned to Cuba. However, neither Rosales nor Carballo was on the list of excluded aliens in 1984—both were excluded after that date. Although Carragher attested that negotiation between the United States and Cuba regarding the excluded Mariel Cubans is ongoing, there is no evidence that Cuba has any particular intention to repatriate Rosales or Carballo.

ceived two years of probation in March 1983; burglary and grand larceny in October 1983, for which he received two six-month sentences, to be served consecutively; escape from a penal institution in February 1984, for which he received a 366-day sentence; and one count of conspiracy to possess with the intent to distribute cocaine in March 1993, for which he received a sixty-three month federal prison sentence and five years of supervised release.

On July 10, 1986, Rosales's immigration parole was revoked by the INS on the basis of the escape and grand larceny convictions, pursuant to INS authority under 8 U.S.C. § 1182(d)(5)(A) (1982) and 8 C.F.R. § 212.5(d)(2) (1986). In a separate proceeding before an immigration judge, Rosales was denied asylum and ordered excluded on June 26, 1987, pursuant to 8 U.S.C. § 1182(a)(20) (1982), for improper documentation. Rosales was in INS detention between July 1986 and May 1988, when he was again released on parole. After he pleaded guilty to the cocaine conspiracy charge in 1993, the INS revoked Rosales's parole, this time pursuant to the Cuban Review Plan. When Rosales was released from federal prison in May 1997, the INS detained him, pursuant to 8 U.S.C. § 1226(e) (1994). Rosales remained in INS detention for four years, during which time he was denied parole twice, in November 1997 and March 1999, under the Cuban Review Plan. In April 2001, Rosales was granted parole and released into a halfway house program. Rosales completed the program in May 2001, and he was subsequently released into the community under conditions of supervision.

Rosales filed his pro se habeas petition in the United States District Court for the Eastern District of

Kentucky on July 9, 1998. In the petition, he alleged that his "continued incarceration is illegal, it violates Due Process, statu[t]es, and case law. . . ." Rosales Joint Appendix ("Rosales J.A.") at 9. The district court initially denied Rosales's habeas petition sua sponte in October of 1998; however, Rosales filed a motion to amend, and the district court vacated its initial denial. On May 3, 1999, the district court denied with prejudice Rosales's amended habeas petition. The court concluded that under the IIRIRA, 8 U.S.C. § 1231(a)(6) (Supp.V. 1999), the Attorney General was authorized to detain Rosales indefinitely, and the court further concluded that such detention did not violate Rosales's constitutional substantive or procedural due process rights. In regard to Rosales's substantive due process claim, the court held that Rosales "ha[d] no fundamental right to be free to roam the United States." Rosales J.A. at 91. With respect to Rosales's procedural due process claim, the court held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Rosales J.A. at 91 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

On August 4, 2000, a panel of this court heard the case on appeal, and on January 31, 2001, the panel reversed the district court's denial of Rosales's petition. Following the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the government petitioned the Court for certiorari, asking that the panel's decision be vacated and remanded in light of *Zadvydas*. On December 10, 2001, the Supreme Court granted the government's request. *Thomas v. Rosales-Garcia*, 122 S.Ct. 662 (2001). Following our sua sponte decision to hear *Carballo v. Luttrell* en banc, Rosales requested

that his case be heard en banc together with *Carballo;* we granted his request.

B. Carballo

Carballo was twenty-five when he arrived in the United States, and he too was soon thereafter released on parole. By 1983, Carballo had been arrested sixteen times, for offenses including aggravated assault, burglary, grand larceny, battery, carrying a concealed weapon and an unlicensed firearm, trespassing, and possession of marijuana.[4] In April 1983, Carballo was convicted of attempted first-degree murder, aggravated assault with a deadly weapon, and robbery, for which he received a sentence of eight years for the murder, eight years for the robbery, and five years for the aggravated assault. During his incarceration, the INS initiated exclusion proceedings, and in September 1994, an immigration judge ordered Carballo excluded, pursuant to 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) (crimes of moral turpitude), (a)(2)(B) (multiple criminal convictions), and (a)(7)(A)(i)(I) (improper documentation) (1994). Upon the completion of his sentence, in June of 1988, Carballo was taken into custody by the INS.[5] He has been detained since then, although his status has been reviewed annually, pursuant to the Cuban Review Plan. While this case was pending, on December 17, 2002, Carballo was placed by the INS in a nine-month residential substance-abuse program at the Union Rescue Mission in Los Angeles.

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[4] There is also evidence that Carballo had a criminal record in Cuba.

[5] Carballo was detained by the INS in 1988 "pending exclusion proceedings," *see* Carballo J.A. at 125, even though he was not actually excluded until 1994, *see* Carballo J.A. at 132.

On September 6, 1990, Carballo filed a pro se habeas petition in the United States District Court for the Northern District of Texas. Carballo claimed that the Attorney General did not have the authority to detain him beyond a reasonable time to effect his exclusion and that his continued detention violated his constitutional substantive and procedural due process rights. A magistrate judge recommended that Carballo's petition be denied, and on November 26, 1991, the district court denied Carballo's petition. The district court concluded that the Attorney General had implied statutory authority to detain Carballo under 8 U.S.C. § 1227(a) (1988). Addressing Carballo's constitutional claims, the court held that because Carballo's detention did not constitute punishment, it did not violate substantive due process. The court further held that Carballo was entitled to only as much procedural due process as Congress granted him. Carballo did not appeal this denial.

On December 11, 1998, Carballo filed a successive habeas petition in the United States District Court for the Western District of Tennessee. The district court denied Carballo's successive petition on May 10, 1999. After finding that Carballo raised the same claims in his successive habeas petition as he had raised in his original habeas petition, the court stated that the "law of the case doctrine prevents this court from reconsidering petitioner's entirely repetitive claim." Carballo Joint Appendix ("Carballo J.A.") at 20. Carballo appealed this denial, and a panel of this court heard the case on March 9, 2001. On October 11, 2001, the panel affirmed the decision of the district court. On November 3, 2001, we sua sponte granted Carballo a rehearing en banc, vacating the decision of the panel.

Carballo requested that his case be heard together with Rosales's, and we granted his request.

II. ANALYSIS

A. Jurisdiction

1. Availability of the Writ of Habeas Corpus

Both Rosales and Carballo filed petitions for habeas corpus relief in the district court under 28 U.S.C. § 2241. Recently in *INS v. St. Cyr*, the Supreme Court definitively concluded that aliens detained by the INS can petition for writs of habeas corpus under 28 U.S.C. § 2241—whether they are detained pursuant to the pre-1996 statutory regime, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), or IIRIRA. *INS v. St. Cyr*, 533 U.S. 289, 298-314 (2001). The Court held that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *Id.* at 301. "[U]nder the pre-1996 statutory scheme—and consistent with its common-law antecedents—it is clear that St. Cyr could have brought his challenge to the Board of Immigration Appeals' legal determination in a habeas corpus petition under 28 U.S.C. § 2241." *Id.* at 308. Although the government argued that certain provisions of AEDPA and IIRIRA barred habeas petitions under those statutes, the Court determined that habeas jurisdiction under § 2241 was not repealed by AEDPA or IIRIRA. *Id.* at 314; *see also Zadvydas*, 533 U.S. at 688 ("§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention."). Therefore, the district courts properly had jurisdiction over Rosales's and

Carballo's habeas petitions, and we have jurisdiction to review the district courts' denials of those petitions.

2. Mootness—Rosales

Rosales was released from INS detention and paroled into the United States in May of 2001; the government contends that Rosales's appeal is therefore moot. "Under Article III of the Constitution, our jurisdiction extends only to actual cases and controversies. We have no power to adjudicate disputes which are moot." *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (quotation omitted). Even if a case was not moot in the district court, if it becomes moot on appeal, we must dismiss the case unless "the relief sought would, if granted, make a difference to the legal interests of the parties." *Id.* Because Rosales is still "in custody" for the purposes of 28 U.S.C. § 2241 and because the relief he seeks, if granted, would make a difference to his legal interests, we conclude that his appeal is not moot.

The government argues that "if a prisoner is released from custody during the pendency of his case, his habeas petition becomes moot." Gov't Supp. Br. re Rosales at 19. In *Jones v. Cunningham*, 371 U.S. 236 (1963), however, the Supreme Court held that a paroled prisoner was in the custody of his state parole board for the purposes of 28 U.S.C. § 2241. "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute . . . ." *Jones*, 371 U.S. at 243; *see also DePompei v. Ohio Adult Parole Auth.*, 999 F.2d 138, 140 (6th Cir. 1993). Although Rosales's parole was not

based on a criminal conviction, it imposes similarly restrictive conditions. *See* Rosales Supp. J.A. at 4-5 (Conditions of Parole). Therefore, we conclude that even though he has been paroled into the United States, Rosales is still in the custody of the INS for the purposes of his habeas petition.[6]

Our inquiry into whether Rosales's claim is moot cannot end, however, with a determination of custody. In *Spencer v. Kemna*, the Supreme Court determined that a petitioner's release did not by itself moot his habeas petition, but the Court then explained that "[t]he more substantial question . . . is whether petitioner's subsequent release caused the petition to be moot because it no longer presented a case or controversy under Article III, § 2, of the Constitution." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Rosales petitioned the district court for habeas relief, alleging that his continued *detention* by the INS was impermissible on both statutory and constitutional grounds. We thus must ask whether Rosales's claim is moot because he is no longer being *detained* by the INS. "The parties must continue to have a personal stake in the outcome of the lawsuit. This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and

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[6] We note that even if Rosales had been released from INS custody, such release would not necessarily moot his appeal. For the purposes of the habeas statutes, a petitioner need only be "in custody" at the time the petition was filed. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Rosales was in INS detention when he filed his habeas petition, and thus the government's argument regarding custody fails regardless of whether Rosales was in detention or released on parole at the time of his appeal.

likely to be redressed by a favorable judicial decision." *Id.* (quotations and citations omitted).

Although Rosales is not currently being detained, his immigration parole can be revoked by the INS at any time for almost any reason.[7] Unlike parole granted following incarceration for a criminal conviction, Rosales need not do anything for the INS to revoke his parole; for instance, the INS can revoke Rosales's parole if it deems such revocation to be "in the public interest." *See* 8 C.F.R. § 212.12(h) (2002). Thus, Rosales's "release" into the United States does not constitute a termination of detention; it simply constitutes a re-

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[7] Under the Cuban Review Plan:

> The Associate Commissioner for Enforcement [of the INS] may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest. . . . A decision to release on parole may contain such special conditions as are considered appropriate. . . .
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> The Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:
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> (1) The purposes of parole have been served;
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> (2) The Mariel Cuban violates any condition of parole;
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> (3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or
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> (4) The period of parole has expired without being renewed.

8 C.F.R. § 212.12(b)(1) & (h) (2002).

prieve from detention.[8] Under these circumstances, we believe that Rosales is threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. We therefore conclude that Rosales's appeal is not moot.

Two other strands of the Supreme Court's mootness jurisprudence support this conclusion. First, the Supreme Court has held that "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' . . . '[I]f it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n. 10 (1982)). Second, the Court has long recognized an exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." This exception applies where "(1) the challenged action [is] in its duration too

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[8] The statutory provision authorizing the Attorney General to parole Rosales provides as follows:

> The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (2000).

short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer*, 523 U.S. at 17 (quotation omitted); *see also Suster v. Marshall*, 149 F.3d 523, 527 (6th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

To determine whether a case has been mooted by the defendant's voluntary conduct, the Supreme Court has articulated the following standard: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. As discussed above, the INS can revoke Rosales's parole at any time. We have noted that "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.7 (2d ed.1984)). The Ninth Circuit has even held that a Mariel Cuban's parole did moot his habeas petition because, on the basis of government declarations, the court concluded that "the alleged wrong will not recur." *Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991). In *Picrin-Peron*, the government stated in its dismissal motion that "[a]bsent Picrin's reinvolvement with the criminal justice system, a change in the Cuban government enabling him to return to Cuba, or the willingness of a third country to accept him, he will be paroled for another year," and an INS official reiterated the statement in a declaration made under oath. *Id.* The government in Rosales's case, however, has made no such promise, nor has the

government made it "absolutely clear" in any other way that potentially indefinite detention of Rosales by the INS cannot reasonably be expected to recur.

We also believe that the indefinite detention of Rosales by the INS is a case "capable of repetition, yet evading review." Because the INS can revoke Rosales's parole at any time and has in fact revoked Rosales's parole twice in the past fifteen years, there is a reasonable expectation that Rosales will again be subject to indefinite INS detention.[9] Moreover, because the INS can grant Rosales parole at any time, such detention can always evade review. The government argues that "there is no basis for concluding that

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[9] The government points out that the INS based its previous revocation of Rosales's parole on his criminal conduct, and the government therefore argues that Rosales himself controls whether the INS will indefinitely detain him again. The Supreme Court has held that "for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig v. Doe*, 484 U.S. 305, 320 (1988). However, as discussed above, the INS can revoke Rosales's parole for a number of reasons—some of which are within Rosales's control, but some of which are not. In *Olmstead v. Zimring*, 527 U.S. 581 (1999), mentally disabled patients challenged their confinement in segregated as opposed to community-based programs. Although the patients were in community-based programs by the time the case was heard, the Court held that "in view of the multiple institutional placements [the patients] have experienced, the controversy they brought to court is 'capable of repetition, yet evading review.'" *Olmstead*, 527 U.S. at 594 n. 6. Because Rosales's parole could be revoked for reasons that are not within his control, his parole is more like the institutional placement described in *Olmstead* than parole in the traditional, criminal sense as described in *Spencer*, 523 U.S. at 15, in which the parolee can control whether his parole is revoked.

when a Mariel Cuban's parole is revoked, the alien will always be rereleased in a time that is so short that the legality of his detention will evade review." Gov't Supp. Br. re Rosales at 22-23. It is true that the Cuban Review Plan requires the INS to follow certain procedures before releasing a Mariel Cuban into the United States. However, the INS granted Rosales parole in the two years between the denial of his habeas petition by the district court and our review, and we have every reason to believe both that the INS could again accomplish a release in the same amount of time and that another habeas petition filed by Rosales would take at least as long as the instant case in arriving in this court. *See Honig v. Doe*, 484 U.S. 305, 320-22 (1988).[10]

3. Successive Habeas Petition—Carballo

The government argues on appeal that "Carballo's petition is an abuse of the writ [of habeas corpus] because it is a second, successive petition that raises the same claims that were denied on the merits in his first petition, and he cannot point to any exception to overcome the bar on successive petitions." Gov't Supp. Br. re Carballo at 57.[11] "A 'successive petition' raises

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[10] We note that the government does not claim that Carballo's recent placement in a residential substance-abuse recovery program moots his case. As the government observes, Carballo's habeas petition challenges the government's authority to restrain his liberty by sending him to a halfway house or other restrictive program.

[11] In the district court, the government also argued that Carballo's successive habeas petition was barred by the doctrines of res judicata and law of the case; the district court denied Carballo's petition on the theory of law of the case. The government does not raise the law of the case argument on appeal, and, as the

grounds identical to those raised and rejected on the merits on a prior petition." *Schlup v. Delo*, 513 U.S. 298, 318 n. 34 (1995) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n. 6 (1986)).[12] Carballo indeed presented the same claims for relief in the petition that gave rise to this appeal as he presented in his habeas petition in the United States District Court for the Northern

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doctrine is prudential rather than jurisdictional, we need not address it. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[A] district court's adherence to law of the case cannot insulate an issue from appellate review."). We note, however, that it is not at all clear to us that the law-of-the-case doctrine should apply to successive habeas petitions. "Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478 (2d ed.2002). Whether successive habeas petitions constitute stages in a single, continuing lawsuit is a question that should be carefully considered. *See Lacy v. Gardino*, 791 F.2d 980, 984-85 (1st Cir.), *cert. denied*, 479 U.S. 888 (1986). Although we do not decide the question, we, like the First Circuit, think it likely that each habeas petition is a separate and distinct case. *See id.; see also McClesky v. Zant*, 499 U.S. 467, 479-85 (1991) (explaining that the "abuse of the writ" doctrine arose because, "[a]t common law, res judicata did not attach to a court's denial of habeas relief. [A] refusal to discharge on one writ [was] not a bar to the issuance of a new writ." (quotation omitted)); *but cf. Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1123 (7th Cir.1991), *cert. denied*, 504 U.S. 922 (1992) ("[T]he law of the case doctrine is applicable to habeas proceedings."); *Raulerson v. Wainwright*, 753 F.2d 869, 875 (11th Cir.1985) (applying the law of the case doctrine to a successive habeas petition).

[12] "An 'abusive petition' occurs 'where a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that disentitle[s] him to the relief he seeks.'" *Schlup*, 513 U.S. at 319 n. 34 (quoting *Kuhlmann*, 477 U.S. at 444 n. 6).

District of Texas in 1990. However, applying the traditional successive-petition doctrine, we conclude that we should reach the merits of Carballo's petition because there has been an intervening change in the law.

Carballo petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. As discussed above, the Supreme Court recently reiterated that § 2241 is the appropriate means for an alien to challenge his detention by the INS. *INS v. St. Cyr*, 533 U.S. at 298-314.[13] Under AEDPA, there are strict "gatekeeping" provisions restricting the ability of federal courts to hear successive habeas petitions. *See* 28 U.S.C. §§ 2244(a) & (b) (2000); *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996). By their own terms, however, these provisions do not apply to petitioners like Carballo who are not in custody pursuant to a conviction in state or federal court. *See Barapind v. Reno*, 225 F.3d 1100, 1111 (9th Cir. 2000). In *Barapind*, the Ninth Circuit explained that "§ 2244(a) cannot apply to a § 2241 petition filed by an INS detainee such as Barapind because § 2244(a) bars successive petitions seeking review of the propriety of a detention *'pursuant to a judgment of a court of the United States.'*" *Id.* (emphasis in original). "Because § 2244(b) makes no reference to habeas petitions filed under § 2241, but rather, applies only to petitions filed pursuant to 28 U.S.C. § 2254, the prior-appellate-review provisions of § 2244(b) do not apply to habeas petitions filed under

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[13] In fact, as an executive detainee, Carballo could file a habeas petition *only* under § 2241. 28 U.S.C. § 2255 applies to persons "in custody under sentence of a court established by Act of Congress," and 28 U.S.C. § 2254(a) applies to persons "in custody pursuant to the judgment of a State court."

§ 2241." *Id.; see also Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998).[14]

Therefore, we apply the pre-AEDPA law governing successive habeas petitions to determine whether we should hear Carballo's petition. The Supreme Court held in *Sanders v. United States* that, "[c]ontrolling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders v. United States*, 373 U.S. 1, 15 (1963) (footnote omitted); *see also Lonberger v. Marshall*, 808 F.2d 1169, 1173 (6th Cir.), *cert. denied*, 481 U.S. 1055 (1987).[15]

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[14] We note that because Carballo could file a habeas petition only under § 2241, the limitations we have imposed on federal prisoners who file § 2241 petitions do not apply. *See, e.g., Charles v. Chandler*, 180 F.3d 753 (6th Cir. 1999) (holding that federal prisoners generally may not circumvent the requirements of § 2255 by filing a second or successive habeas petition under § 2241).

[15] In subsequent cases involving prisoners challenging their incarceration pursuant to their convictions under state or federal law, the Supreme Court limited the *Sanders* test for when federal courts may consider the merits of successive habeas petitions. In *McClesky*, 499 U.S. at 493-94, the Court required a showing of "cause and prejudice," developed in the context of procedural default, by prisoners filing second or subsequent habeas petitions that raise new claims. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992), extended this requirement to prisoners filing successive habeas petitions. *See also Schlup*, 513 U.S. at 318 ("[A] habeas court may not ordinarily reach the merits of successive claims . . . absent a showing of cause and prejudice.") (citation omitted). Carballo, however, is not being detained on the basis of a criminal conviction under either state or federal law. Although it would be possible

Because Carballo made the same claims in the Northern District of Texas as he made in the district court below, and because the Northern District of Texas denied these claims on the merits, the first two prongs of the *Sanders* test for successive habeas petitions clearly apply. In regard to the third prong, the *Sanders* Court stated that "[e]ven if the same ground was rejected on the merits on a prior application, it is

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for him to show "cause," we do not see how he could show "prejudice" without a trial and conviction. Therefore, we conclude that the Court's cause and prejudice requirement does not apply to Carballo.

We note that if the cause and prejudice requirement did apply to Carballo, we would conclude that he has cause to file a successive habeas petition. The Ninth Circuit has construed "cause" in the context of successive habeas petitions to mean "cause for bringing a petition that fails to present a new ground for relief. In other words, a petitioner must show cause for seeking review of the same claim twice—such as the discovery of new facts, or an intervening change in the law, that warrants reexamination of the same ground for relief raised in an earlier petition." *Campbell v. Blodgett*, 997 F.2d 512, 524 (9th Cir. 1992), *cert. denied*, 510 U.S. 1215 (1994). For the reasons stated below in regard to the "ends of justice" prong of the *Sanders* test, we believe that there has been an intervening change in the law from the time that Carballo filed his habeas petition in the Northern District of Texas.

Furthermore, the Supreme Court has recognized a "miscarriage of justice" exception to the cause and prejudice requirement, and the Court has equated this exception with the "ends of justice" prong of the *Sanders* test. *See Sawyer*, 505 U.S. at 339. Arguably, the Court has limited this exception for prisoners challenging their state or federal convictions to cases in which "the petitioner 'establish[es] that under the probative evidence he has a colorable claim of factual innocence.'" *Id.* (quoting *Kuhlmann*, 477 U.S. at 454). However, like the cause and prejudice requirement itself, the "actual innocence" requirement cannot apply to Carballo in that he is not being detained on the basis of a conviction for a state or federal crime.

open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground." *Sanders*, 373 U.S. at 16. "If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law." *Id.* at 17; *see also Lonberger*, 808 F.2d at 1174. Applying *Sanders*, Carballo argues that IIRIRA and the Supreme Court's decision in *Zadvydas* constitute an intervening change in the law and thus that the ends of justice would be served by considering the claims in his successive habeas petition. *See* Carballo's Supp. Br. at 13-14. The government, however, also applying *Sanders*, contends that *Zadvydas* does not constitute a change in the law and that IIRIRA does not apply to Carballo. *See* Gov't Supp. Br. re Carballo at 57-62.

In our analysis below, we conclude that IIRIRA is the appropriate statute to apply to Rosales and Carballo. We also agree with Carballo that IIRIRA, and the Supreme Court's interpretation of its post-removal-period detention provision in *Zadvydas*, constitute an intervening change in the law sufficient to warrant our review of his petition. Although the post-removal-period detention provision of IIRIRA is in itself not substantially different from the detention provision in pre-IIRIRA law, the Supreme Court's construction of IIRIRA's post-removal-period detention provision in *Zadvydas* is different from the construction of the detention provision in pre-IIRIRA law that prevailed in most circuits at the time Carballo filed his original habeas petition. Therefore, Carballo is able in this habeas petition to raise legal arguments that he was unable to raise in his habeas petition in the Northern District of Texas. *See Collins v. Zant*, 892 F.2d 1502, 1505 (11th Cir.), *cert. denied*, 498 U.S. 881

(1990) ("In analyzing 'the ends of justice,' a court may consider new *arguments* (based, for example, on intervening changes in the law) that a petitioner raises in support of an old claim.") (emphasis in original). Because, moreover, such arguments go to the constitutionality of and statutory authorization for Carballo's indefinite detention, it serves the ends of justice for us to reach the merits of Carballo's successive habeas petition.[16]

B. Standard of Review

We review de novo a district court's denial of a petition for the writ of habeas corpus filed under 28 U.S.C. § 2241. *Asad v. Reno*, 242 F.3d 702, 704 (6th Cir. 2001).

C. Applicable Statute

There are two versions of the Immigration and Nationality Act ("INA"), codified as amended at 8 U.S.C. § 1101 *et seq.*, that could potentially apply to the petitioners in the present appeals: (1) the version of the INA in effect between 1990 and 1995[17]; and (2) the INA as amended by the Illegal Immigration Reform and

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[16] We would still conclude that IIRIRA and its limiting construction in *Zadvydas* constituted a sufficient intervening change in the law to warrant our review of Carballo's successive habeas petition even if we had concluded that IIRIRA was not the appropriate statute to apply to Carballo. As we explain, *infra*, whether IIRIRA applies to Carballo is a complicated question; at the very least, the *Zadvydas* Court's application of IIRIRA to a habeas petitioner similarly situated to Carballo raises a new question as to what statute authorizes Carballo's detention.

[17] The INA was amended in 1990 by the Immigration Act of 1990, Pub.L. No. 101-649, 104 Stat. 4471 (1990).

Immigrant Responsibility Act of 1996 ("IIRIRA").[18] Rosales and Carballo argue that we should apply IIRIRA in assessing whether their detention by the INS is a violation of statutory and constitutional law; the government contends that we should instead apply the law in effect between 1990 and 1995.[19]

According to the petitioners, we should apply IIRIRA because, in *Zadvydas*, the Supreme Court applied IIRIRA "to a petitioner who had been placed in deportation proceedings and ordered deported *prior* to the statute's April 1, 1997 effective date." Rosales's Supp. Br. at 9 (emphasis in original). The Supreme Court in *Zadvydas* did apply IIRIRA to such a petitioner, Zadvydas, but it did not explain its reason for so doing. *See Zadvydas*, 533 U .S. at 682. Moreover, the government and the petitioner in *Zadvydas* agreed on what statute to apply. *See Zadvydas v. Underdown*, 185 F.3d 279, 286-87 (5th Cir. 1999), *vacated and remanded sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001). According to the government, § 309(c)(1) of IIRIRA precludes us from applying IIRIRA to an alien excluded prior to the statute's effective date. Section 309(c)(1), entitled "General rule that new rules do not apply," provides that:

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[18] IIRIRA was enacted as Division C of the Department of Defense Appropriation Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), and it was amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996).

[19] We note that Rosales was excluded from the United States on July 10, 1986, he began the detention from which his habeas petition arose in May of 1997, and he filed his habeas petition in 1998. Carballo began the detention from which his habeas petition arose in 1988, he filed his habeas petition in 1990, and he was excluded from the United States in September of 1994.

> Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date [April 1, 1997]—(A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

8 U.S.C. § 1101 (2000), note regarding "Effective Dates" (reprinting IIRIRA § 309(c)(1)). Inasmuch as the Supreme Court in *Zadvydas* did not discuss the application of IIRIRA to Zadvydas, we cannot simply assume that such application is appropriate for all aliens deported or excluded before April 1, 1997. We are persuaded for other reasons, however, that IIRIRA is the appropriate statute to assess in our review of the merits of Rosales's and Carballo's habeas petitions.

The government contends that IIRIRA does not apply to Rosales and Carballo because, pursuant to § 309(c), IIRIRA does not apply to aliens who were in exclusion or deportation proceedings prior to April 1, 1997. It is not clear from the government's brief whether it believes this interpretation to be of the statute's retroactivity (i.e., that IIRIRA does not apply retroactively to aliens ordered deported or excluded prior to its effective date) or of the statute's general applicability (i.e., that IIRIRA generally does not apply to aliens ordered deported or excluded prior to its effective date). To the extent that the argument is one of IIRIRA's retroactivity, we do not believe that retroactivity is at issue in these appeals. In *Alvarez-Mendez v. Stock*, the Ninth Circuit considered the legality of an excludable alien's detention under the statute in effect at the time of the decision. *Alvarez-*

Mendez v. Stock, 941 F.2d 956, 960 (9th Cir. 1991), *cert. denied*, 506 U.S. 842 (1992). "Although the new section 1226(e) does not retroactively authorize any of the Attorney General's acts accomplished prior to the amendment, we are concerned here only with the legality of Alvarez-Mendez's *present detention*. Because this case involves a petition for the writ of habeas corpus, and not a claim for damages for illegal detention, *the only issue before us is whether Alvarez-Mendez's detention is illegal today*." *Id.* (emphasis added). We agree with this reasoning. Rosales and Carballo are not challenging the legality of their original detention—they are challenging the INS's authority to detain them now. Therefore, whether IIRIRA *retroactively* authorizes Rosales's and Carballo's detention is irrelevant; we need only assess whether IIRIRA *currently* authorizes their detention.[20]

To the extent that the government's argument is one of IIRIRA's general applicability, the Supreme Court has stated that "[s]ection 309(c)(1) is best read as merely setting out the *procedural* rules to be applied to removal proceedings pending on the effective date of the statute." *St. Cyr*, 533 U.S. at 318 (emphasis in original). The *St. Cyr* Court also noted that "the Conference Report expressly explained, '[Section 309(c)] provides for the transition to new *procedures* in the

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[20] The Fifth Circuit has approached this question as one of retroactivity. *See Zadvydas*, 185 F.3d at 286 ("Zadvydas' detention could be covered by one of four separate detention regimes, depending on the degree of retroactivity involved."). Other circuits have noted in light of the Fifth Circuit's discussion in *Zadvydas* that there is a question as to which statute applies. *See Sierra v. INS*, 258 F.3d 1213, 1216 n.2 (10th Cir.), *cert. denied*, 122 S.Ct. 676 (2001); *Duy Dac Ho v.. Greene*, 204 F.3d 1045, 1049-50, 1055 & n.8 (10th Cir. 2000); *Chi Thon Ngo*, 192 F.3d at 395.

case of an alien already in exclusion or deportation proceedings on the effective date.'" *Id.* (quoting H.R. Conf. Rep. No. 104-828, p. 222 (1996)) (emphasis in original). In other words, according to the Supreme Court, § 309(c) provides only that IIRIRA does not apply to removal *proceedings* that were *pending* on April 1, 1997. *See also Zaavydas*, 185 F.3d at 286-87 & n. 7 ("[T]he natural reading of the clause would thus seem to be that it applies only to proceedings that are pending as of the effective date."); *cf. Carrera-Valdez v. Perryman*, 211 F.3d 1046, 1048 (7th Cir. 2000) (applying pre-IIRIRA law to an alien "subject to an order of exclusion" on April 1, 1997); *Duy Dac Ho*, 204 F.3d at 1050 (same).[21]

As neither Carballo's nor Rosales's exclusion proceeding was *pending* on April 1, 1997, and as neither petitioner is challenging his exclusion *proceeding*, we conclude that IIRIRA § 309(c) does not limit the applicability of IIRIRA to Rosales or Carballo.[22] IIRIRA

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[21] The Court in *St. Cyr* also noted that "[t]he INS' reliance . . . on *INS v. Aguierre-Aguierre*, 526 U.S. 415, 420 (1999), is beside the point because that decision simply observed that the new rules would not apply to a proceeding filed *before* IIRIRA's effective date." *St. Cyr*, 533 U.S. at 318 n. 42 (emphasis in original). In *Aguierre-Aguierre*, the Court had noted in regard to an alien deported prior to IIRIRA's effective date that "[t]he parties agree IIRIRA does not govern respondent's case," and it cited IIRIRA § 309(c). *Aguierre-Aguierre*, 526 U.S. at 420. We emphasize that *Aguierre-Aguierre* involved an alien's challenge to his deportation *proceeding*. *See id.* at 418.

[22] At oral argument, the government also argued that we should defer to its interpretation of IIRIRA § 309(c) pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At least one other circuit has invoked *Chevron* in the context of determining which statute to assess in an excluded or deported alien's petition for habeas relief from detention. *See*

governs the current detention of removed aliens beyond the removal period; therefore, we apply IIRIRA in assessing the legality of Rosales's and Carballo's current detention by the INS.

D. Statutory Authority to Detain Indefinitely

1. Statutory Construction in *Zadvydas*

Under IIRIRA, Rosales's and Carballo's detention by the INS is governed by 8 U.S.C. § 1231(a)(6) (2000), the post-removal-period detention provision. Normally, after a final order of removal has been entered against an alien, the government must remove the alien from the United States within a 90-day statutory removal

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Zadvydas, 185 F.3d at 286-87. We, however, do not believe that *Chevron* applies in this context. First, the government has only advocated in litigation the application of pre-IIRIRA law to petitioners like Rosales and Carballo. An interpretation contained in a brief—like interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines—lacks the force of law and is therefore not entitled to *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000). Second, although the government's position is entitled to respect pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), we conclude that the government's position has been inconsistent and is therefore unpersuasive. *See Christensen*, 529 U.S. at 587.

In a number of other cases in which excluded, deported, or removed aliens challenged the legality of their continued detention, the government argued that IIRIRA should apply to alien petitioners who had been excluded or deported prior to April 1, 1997. *See, e.g., Sierra v. INS*, 258 F.3d 1213, 1216 n.2 (10th Cir.), *cert. denied*, 534 U.S. 1071 (2001); *Zadvydas*, 185 F.3d at 286. Inasmuch as shifting agency interpretations issued in *regulations* are accorded less deference under the highly deferential *Chevron* standard, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), we see no reason why we should respect shifting agency interpretations expressed in briefs.

period, during which the alien is held in custody. 8 U.S.C. §§ 1231(a)(1)(A) (2000) ("Except as otherwise provided in the [*sic*] section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period').") & (2) ("During the removal period, the Attorney General shall detain the alien."); *see also Zadvydas*, 533 U.S. at 682. 8 U.S.C. § 1231(a)(6) (2000) provides, however, that:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6) (2000).[23] In *Zadvydas*, the Supreme Court addressed the detention of two aliens

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[23] We note that IIRIRA's removal and detention provisions are substantially similar to the exclusion and detention provisions in pre-IIRIRA law. 8 U.S.C. § 1226(e) (1994) provided:

> (1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense).
>
> (2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported because the condition

who had been removed on grounds of deportability.[24] Concluding that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem," the *Zadvydas* Court read the provision to limit "an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Zadvydas*, 533 U.S. at 689. The Court then recognized six months as a presumptively reasonable period of post-removal-period detention. *Id.* at 699-702. Because we are assessing the

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described in section 1253(g) (country of citizenship delays in the acceptance of deportees) of this title exists.

8 U.S.C. § 1226(e) (1994). As the Third Circuit has noted, "[u]nder the IIRIRA, what was once implicit is now express—the Immigration Act now specifically provides that the Attorney General shall detain an 'inadmissible' alien for a 90-day period pending 'removal' from the country, and may continue to detain him until deportation if he has been found guilty of designated crimes." *Chi Thon Ngo*, 192 F.3d at 394-95.

[24] 8 U.S.C. § 1231(a)(6) (2000) applies to three groups of removable aliens: (1) aliens who are "inadmissible under section 1182" ("aliens who are removable on grounds of inadmissibility"); (2) aliens who are deportable under §§ 1227(a)(1)(C) (violation of nonimmigrant status or condition of entry), 1227(a)(2) (criminal offenses), and 1227(a)(4) (security and related grounds) ("aliens who are removable on grounds of deportability"); and (3) aliens who are "a risk to the community or unlikely to comply with the order of removal."

Under IIRIRA, Zadvydas and Kim Ho Ma, the two aliens at issue in *Zadvydas*, are removable on grounds of deportability pursuant to 8 U.S.C. § 1227(a)(2) (2000). Pre-IIRIRA, Zadvydas was classifed as deportable, *see Zadvydas*, 533 U.S. at 684, and Kim Ho Ma would have been classified as deportable. Rosales and Carballo, classified as excludable aliens under pre-IIRIRA law, are removable under IIRIRA on grounds of inadmissibility pursuant to 8 U.S.C. § 1182(a)(6) (2000).

same provision of IIRIRA that the Supreme Court considered in *Zadvydas*, the petitioners ask us simply to apply to them the reasonableness limitation the Supreme Court read into the provision in *Zadvydas*. The government contends, however, that the *Zadvydas* Court's construction of 8 U.S.C. § 1231(a)(6) (2000) does not apply to Rosales and Carballo because the detention of aliens who are removable on grounds of inadmissibility does not raise the same constitutional concerns as the detention of aliens who are removable on grounds of deportability.

On the basis of the plain language of the provision, we find it difficult to believe that the Supreme Court in *Zadvydas* could interpret § 1231(a)(6) as containing a reasonableness limitation for aliens who are removable on grounds of deportability but not for aliens who are removable on grounds of inadmissibility. Section 1231(a)(6) itself does not draw any distinction between the categories of removable aliens; nor would there be any statutory reason to interpret "detained beyond the removal period" differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (discussing presumption that a statutory term retains the same meaning throughout a statute and in particular throughout a provision). The Ninth Circuit recently addressed this issue, and it concluded that the Supreme Court's construction of § 1231(a)(6) in *Zadvydas* applied to an inadmissible, formerly excludable, alien. *See Lin Guo Xi v. INS*, 298 F.3d 832, 834 (9th Cir. 2002) ("We are now presented with the question of whether [8 U.S.C. § 1231(a)(6)] bears the same meaning for an individual deemed inadmissible to the United States under 8

U.S.C. § 1182. The answer is yes."). The court in *Lin Guo Xi* explained that "[s]ection 1231(a)(6) . . . does not draw any distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability." *Id.* at 835.[25]

We also do not believe that the Supreme Court intended to construe § 1231(a)(6) differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability. The government focuses on the *Zadvydas* Court's statement at the outset of its opinion that "[w]e deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question." *Zadvydas*, 533 U.S. at 682. In addition, the government looks to the portion of *Zadvydas* in which the Court distinguished its decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). *See Zadvydas*, 533 U.S. at 693-95. The Court stated that "[a]lthough *Mezei*, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. . . . [Mezei's] presence on Ellis Island did not count as entry into the United States." *Id.* at 693. The Court then further explained:

> The distinction between an alien who has effected an entry into the United States and one who

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[25] The court in *Lin Guo Xi* also noted that "[t]he statute, on its face, makes no exceptions for inadmissible aliens. . . . It is a venerable principle of statutory interpretation 'that where the Legislature makes a plain provision, without making any exception, the courts can make none'." *Lin Guo Xi*, 298 F.3d at 836 (quoting *French's Lessee v. Spencer*, 62 U.S. (21 How.) 228, 238 (1858)).

> has never entered runs throughout immigration law. . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. . . . [O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

Id. According to the government, "[i]t is unreasonable to assume the *Zadvydas* Court went to such great lengths to distinguish the Government's authority to detain inadmissible aliens from its authority to detain aliens who have entered the country only to mandate that the courts treat both groups of aliens identically under § 1231(a)(6)." Gov't Supp. Br. re Rosales at 38-39.

We agree with the government that the *Zadvydas* Court addressed only the constitutional concerns raised by the indefinite detention of aliens who are removable on grounds of deportability, but we also agree with the Ninth Circuit in *Lin Guo Xi* that the Supreme Court's *holding* in *Zadvydas* was "unqualified." *Lin Guo Xi*, 298 F.3d at 836. "Although *Zadvydas* concerned the second prong of the statute—relating to deportable aliens—the Court's ultimate holding addresses the statute as a whole: 'we construe the statute to contain an implicit "reasonable time" limitation, the application of which is subject to federal court review.'" *Lin Guo Xi*, 298 F.3d at 835 (quoting *Zadvydas*, 533 U.S. at 682). The *Zadvydas* Court also noted that the statute "applies to certain categories of aliens who have been ordered removed, namely inadmissible aliens, criminal

aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons. . . ." *Zadvydas*, 533 U.S. at 688. Furthermore, in stating that the statute does not permit indefinite detention, the Court referred generally to aliens as opposed to aliens who are removable on grounds of deportability: "[i]n our view, the statute, read in light of the Constitution's demands, limits *an alien's* post-removal-period detention to a period reasonably necessary to bring about *that alien's* removal from the United States." *Id*. at 689 (emphasis added).

As in *Lin Guo Xi*, the government in the instant cases "has offered no authority suggesting that a litigant may not take advantage of a statutory interpretation that was guided by the principle of constitutional avoidance when that litigant's case does not present the constitutional problem that prompted the statutory interpretation." *Lin Guo Xi*, 298 F.3d at 839. In a case addressing a remarkably similar issue of statutory construction, the Third Circuit recently stated that "[i]t simply cannot be that the meaning will change depending on the background or pedigree of the petitioner. Were we to so hold, we would render the meaning of any statute as changeable as the currents of the sea, and potentially as cruel and capricious." *Chmakov v. Blackman*, 266 F.3d 210, 215 (3rd Cir. 2001). We fully agree with this reasoning.

In *Chmakov*, the court addressed the applicability of the Supreme Court's construction of certain provisions of IIRIRA and AEDPA to individuals who did not raise the same constitutional concerns as the individuals in the case in which the Court construed the statute. The Supreme Court in *St. Cyr* held that, notwithstanding

certain provisions of IIRIRA and AEDPA, aliens who had been ordered deported on the basis of criminal convictions could petition the federal courts for habeas relief from their deportation decisions. *St. Cyr*, 533 U.S. at 298-314. The Court in *St. Cyr* interpreted IIRIRA and AEDPA not to preclude federal habeas jurisdiction both because such preclusion raised serious constitutional concerns under the Suspension Clause and because there was no clear and unambiguous statement of congressional intent to preclude habeas. In *Chmakov*, the government argued that although the *St. Cyr* Court had interpreted IIRIRA and AEDPA not to repeal federal habeas jurisdiction over *criminal* deportees, the Court's interpretation of those statutes did not apply to the Chmakovs because, as *non-criminal* deportees, the Suspension Clause could not be a cause for constitutional concern. *Chmakov*, 266 F.3d at 215. The Third Circuit responded to this argument by first stating that "[t]hat argument borders on the nonsensical," and the court then held that "Congress has preserved the right to habeas review for both criminal and non- criminal aliens ." *Id.*

Finally, we note that [the] *Zadvydas* Court did not actually distinguish between aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability in its analysis of the constitutional concerns raised by the indefinite detention of aliens who are removable on grounds of deportability. The Court only refers to "admission" at the outset of the opinion; in its discussion of the constitutional concern raised by the statute, the Court distinguishes between aliens who have "entered" the United States and those who have not. *Zadvydas*, 533 U.S. at 682, 692. As we explained above, *see supra* note

1, "admission" is a defining principle in IIRIRA, whereas "entry" was a defining principle in pre-IIRIRA immigration law. In its briefs in the instant appeal, as in *Lin Guo Xi*, the government implies that "the central operating terms of the two statutes are functionally the same—namely . . . that 'entry' and 'admission' are interchangeable and that 'excludable' and inadmissible' are interchangeable." *Lin Guo Xi*, 298 F.3d at 838. As we also explained above in note 1, however, these terms are *not* interchangeable. *See also id.* Admission is defined as "the *lawful* entry of [an] alien into the United States," 8 U.S .C. § 1101(a)(13)(A) (2000) (emphasis added); aliens who enter this country illegally and who were formerly classified as "deportable" are now classified as "inadmissible." Therefore, to the extent that the *Zadvydas* Court distinguished between categories of aliens in its analysis of the constitutional concerns raised by the statute, it distinguished only between excludable and deportable aliens.[26]

We explained above that, on the basis of the plain language of the statute, we do not believe that the *Zadvydas* Court could construe the statute differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability. It is even less conceivable, therefore, that the Court construed the statute differently for ex-

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[26] At least in its regulations, the INS appears to agree with this analysis. The government argues in the instant cases that the Supreme Court's statutory construction in *Zadvydas* should not apply to *any* inadmissible aliens. However, after the Court's opinion was issued in *Zadvydas*, the INS promulgated regulations limiting the post-removal-period detention both for aliens who are removable on grounds of deportability and for aliens who are removable on grounds of inadmissibility, excepting those formerly classified as excludable. 8 C.F.R. § 241.13 (2002).

cludable and deportable aliens. In enacting IIRIRA, Congress not only abolished the use of the term "excludable," but it also abolished that category of alien. "The INA is no longer denominated in terms of 'entry' and 'exclusion.' IIRIRA replaced these terms with the broader concept of 'admission.'" *Lin Guo Xi*, 298 F.3d at 838; *see also id.* ("We simply cannot ignore that 'excludable' is no longer a term that has any statutory import under the INA."). To accept the government's argument that the *Zadvydas* Court's construction of § 1231(a)(6) does not apply to Rosales and Carballo, therefore, we would have to conclude that the *Zadvydas* Court interpreted a statute currently in force to apply differently to a category of alien that no longer exists in immigration law. Without explicit instruction by the Court, we will not reach such a conclusion.

As the court in *Lin Guo Xi* concluded, "[t]he clear text of the statute, coupled with the Supreme Court's categorical interpretation, leaves us little choice but to conclude that *Zadvydas* applies to inadmissible individuals like Lin Guo Xi. The statute, on its face, makes no exceptions for inadmissible aliens. The Supreme Court's unqualified holding provides that the statute 'does not permit indefinite detention.'" *Lin Guo Xi*, 298 F.3d at 836 (quoting *Zadvydas*, 533 U.S. at 689); *see also Borrero v. Aljets*, 178 F.Supp.2d 1034, 1042 (D.Minn. 2001) ("[W]e can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others. We therefore must conclude that § 1231(a)(6), as construed in *Zadvydas*, does not authorize the INS to detain Peti-

tioner[, an excludable alien,] indefinitely.").[27] We thus agree with the petitioners that we should apply 8 U.S.C. § 1231(a)(6) (2000) to them with the reasonableness limitation that the Court read into that provision in *Zadvydas*. However, because it is not completely clear from the Court's opinion in *Zadvydas* how the Court intended its statutory construction to be applied, we also explain why constitutional concerns would independently compel us to construe IIRIRA's post-removal-period detention provision to contain a reasonableness limitation for excludable aliens.

2. Constitutional Concern Raised with Regard to Excludable Aliens

a. Applicability of Fifth Amendment Due Process to Excludable Aliens

Describing the doctrine of constitutional avoidance, the *Zadvydas* Court stated "when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be

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[27] Justice Kennedy also noted in his dissent that:

> Accepting the majority's interpretation, then, there are two possibilities, neither of which is sustainable. On the one hand, it may be that the majority's rule applies to both categories of aliens, in which case we are asked to assume that Congress intended to restrict the discretion it could confer upon the Attorney General so that all inadmissible aliens must be allowed into our community within six months. On the other hand, the majority's logic might be that inadmissible and removable aliens can be treated differently. Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not another. The text does not admit of this possibility.

Zadvydas, 533 U.S. at 710 (Kennedy, J., dissenting).

avoided.'" *Zadvydas*, 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Court then held that "the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* at 689. "A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to depriv[e] any person . . . of liberty . . . without due process of law." *Id.* at 690. The Court concluded that while indefinite civil detention may be permissible in some few cases, an alien's status as removable is alone insufficient to outweigh his constitutionally protected liberty interest. *Id.* at 690-92.

Neither the Court's holding nor the Court's discussion of the due process problems with indefinite detention distinguish between excludable and other aliens. Following its conclusion that an alien's status as removable alone does not outweigh his constitutionally protected liberty interest, however, the Court noted: "The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), as support." *Id.* at 692. The Court explained that *Mezei* involved an excludable alien, and, as we describe above, it then distinguished *Mezei* from the cases before it by invoking the entry fiction. *Id.* at 693-94 ("Although *Mezei*, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. . . . His presence on Ellis Island did not count as entry into this country once again.").

The government first contends in these appeals that this portion of the Court's opinion in *Zadvydas* demonstrates that the detention of excludable aliens cannot raise constitutional concerns because such detention "does not *implicate* the Fifth Amendment." Gov't Supp. Br. re Rosales at 50 (emphasis added). We could not more vehemently disagree. Excludable aliens—like all aliens—are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments:

> The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). While we respect the historical tradition of the "entry fiction," we do not believe it applies to deprive aliens living in the United States of their status as "persons" for the purposes of constitutional due process. In fact, in *Mathews v. Diaz*, the Supreme Court held in regard to Cuban aliens who were in the United States on immigration parole pursuant to 8 U.S.C. § 1182(d)(5), that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [of the Due Process Clauses of the Fifth and Fourteenth Amendments]." *Mathews v. Diaz*, 426 U.S. 67, 75 n.7, 77 (1976); *see also Plyler v.*

Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

As we understand the entry fiction, and the Supreme Court's discussion of it in *Zadvydas*, excludable aliens *are* treated differently for due process purposes than deportable aliens: they are entitled to less process.[28] In *Landon v. Plasencia*, the Court explained that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a *fair hearing* when threatened with deportation." *Landon*, 459 U.S. at 32 (citations omitted) (emphasis added). And in *Mezei*, the Court held that:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after *proceedings* conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry

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[28] Justice Scalia explained in his dissent in *Zadvydas* that the traditional distinction between excludable and deportable aliens developed "with regard to what *procedures* are necessary to prevent entry, as opposed to what *procedures* are necessary to eject a person already in the United States." *Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting) (emphasis in original); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation *proceedings*. It does not limit the right of excludable aliens detained within United States territory to humane treatment.") (emphasis added) (footnote omitted).

> stands on a different footing: "Whatever the *procedure* authorized by Congress is, it is due process as far as an alien denied entry is concerned."

Mezei, 345 U.S. at 212 (citations omitted) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)) (emphasis added). The fact that excludable aliens are entitled to less process, however, does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. If excludable aliens were not protected by even the substantive component of constitutional due process, as the government appears to argue, we do not see why the United States government could not torture or summarily execute them. Because we do not believe that our Constitution could permit persons living in the United States—whether they can be admitted for permanent residence or not—to be subjected to *any* government action without limit, we conclude that government treatment of excludable aliens *must* implicate the Due Process Clause of the Fifth Amendment.[29]

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[29] Although some other circuits have concluded that the detention of excludable aliens does not violate constitutional due process, no circuit has concluded that the Due Process Clauses of the Fifth and Fourteenth Amendments do not apply to excludable aliens. *See, e.g .*, *Duy Dac Ho*, 204 F.3d at 1059 ("[W]hile aliens physically present in the United States are clearly 'persons' afforded some Fifth Amendment rights, they have no constitutional rights regarding their application for admission."); *Chi Thon Ngo*, 192 F.3d at 396 ("Even an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process."); *Zadvydas*, 185 F.3d at 289 ("The language of the due process clause refers to 'persons' not 'citizens,' and it is well established that aliens within the territory of the United States may invoke its provisions. . . . While the cases have drawn a line

b. Indefinite Detention of Excludable Aliens under the Fifth Amendment

Although we believe that the Supreme Court's decision in *Zadvydas* fully supports our conclusion that the Due Process Clauses of the Fifth and Fourteenth Amendments apply to excludable aliens, we recognize that the *Zadvydas* Court left open the question whether the indefinite detention of excludable aliens raises the same constitutional concerns under those clauses as the indefinite detention of aliens who have entered the United States. We now conclude that it does.

In *United States v. Salerno*, the Supreme Court explained that "the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving

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for some purposes between excludable aliens who failed to effect entry into the country unimpeded and resident aliens, in this Circuit it is clear that the former also can be considered persons entitled to protection under the 14th Amendment."); *Lynch*, 810 F.2d at 1374 ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials."); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981) (construing the statute in effect at the time not to permit indefinite detention and stating that "it would appear that an excluded alien in physical custody within the United States may not be 'punished' without being accorded the substantive and procedural due process guarantees of the Fifth Amendment. Surely Congress could not order the killing of Rodriguez-Fernandez. . . .") (footnote omitted).

a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted). The *Zadvydas* Court reiterated that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

Therefore, government detention violates a person's substantive due process rights unless such detention is "ordered in a *criminal* proceeding with adequate procedural protections" or "in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (citing *Salerno*, 481 U.S. at 739, and quoting *Foucha*, 504 U.S. at 80; *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)) (emphasis in original). In *Zadvydas*, the Court determined that the detention of removable aliens by the INS is "civil, not criminal, and we assume that [it is] nonpunitive in purpose and effect." *Id.* The Court then looked to the regulatory goals of the statute to determine whether they constituted sufficient "special justification" to outweigh the aliens' interest in avoiding detention. According to the government's brief in *Zadvydas*, the regulatory goals of IIRIRA's post-removal-period detention provision are "'ensuring the appearance of aliens at future immigration proceedings' and '[p]reventing danger to the community.'" *Id.* (quoting Brief for Respondents in No. 99-7791, p.

24). The Court concluded that the flight prevention justification was "weak or nonexistent where removal seems a remote possibility at best," and the dangerousness justification could not be supported by alien status alone. *Id.* at 690-91. Explaining that "[i]n cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger," the Court held that an alien's status as removable did not constitute such a special circumstance because it "bears no relation to a detainee's dangerousness." *Id.* at 691-92 (emphasis in original).

Rosales's and Carballo's status as excludable aliens does not alter the above analysis. An excludable alien who cannot be removed to his country of origin presents no greater risk of flight than the aliens who could not be removed to their countries of origin in *Zadvydas;* nor does an excludable alien's status relate any more to his dangerousness than the removable status of the aliens in *Zadvydas* related to their dangerousness.[30] However, the government contends that because Rosales and Carballo are excludable

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[30] The INS's detention of Rosales and Carballo is as potentially permanent as was the INS's detention of the aliens in *Zadvydas.* Although Rosales's and Carballo's detention is governed by the Cuban Review Plan, the Plan, like the general regulations in effect at the time of the Court's decision in *Zadvydas*, does not limit the period of possible post-removal-period detention. *Compare* 8 C.F.R. § 241.4 (2001) *with* 8 C.F.R. § 212.12 (2002). In fact, under the Cuban Review Plan, post-removal-period detainees may *only* be released on parole "for emergent reasons or for reasons deemed strictly in the public interest." 8 C.F.R. § 212.12(b)(1). Therefore, the likelihood that they will be detained indefinitely is much greater.

aliens, their detention should not be subject to the same analysis as the detention of the aliens in *Zadvydas*. According to the government, because excludable aliens do not have a constitutional right to enter the United States, the INS must be permitted to detain them indefinitely if they cannot be removed.

We recognize that excludable aliens do not have a constitutional right to enter or be admitted to the United States; indeed, no alien has a constitutional right to enter or be admitted to the United States. We also recognize that the INS is faced with an extremely difficult situation in the case of aliens who legally *cannot* enter or be admitted to the United States, yet who, by virtue of the fact that their country of origin will not repatriate them, are *in* the United States. However, the Supreme Court in *Zadvydas* confronted much the same situation. Aliens who are removed on grounds of deportability do not have a constitutional right to stay in the United States, and, as the Court recognized, Congress has plenary power to create immigration law. *Zadvydas*, 533 U.S. at 695-96. "But that power is subject to important constitutional limitations." *Id.* at 695. Like the Supreme Court, we do not question "the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." *Id.* "Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." *Id.*

The Supreme Court in *Zadvydas* concluded that "for the reasons we have set forth, we believe that an alien's liberty interest is, at the least, strong enough to raise a

serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Zadvydas*, 533 U.S. at 696. We draw the same conclusion with regard to excludable aliens. If the Due Process Clause of the Fifth Amendment applies to Rosales and Carballo, as we believe that it must, we do not see how we could conclude that the indefinite and potentially permanent detention of Rosales and Carballo raises any less serious constitutional concerns than the indefinite and potentially permanent detention of the aliens in *Zadvydas*. We emphasize that we understand that this situation, involving criminal aliens whose removal cannot be effected, is a difficult one: we, too, find it unpalatable that inadmissible aliens who have previously abused the privilege of immigration parole should be permitted additional opportunities to live in this country simply because their country of origin will not have them back. As the *Zadvydas* Court explained, though, "[t]he choice . . . is not between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under release conditions that may not be violated." *Id.*[31] Moreover, we find it not only

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[31] For instance, Rosales's conditions of parole include the following restrictions, any violation of which "may result in the revocation of your parole and your return to an appropriate INS detention facility," Rosales Supp. J.A. at 4 (Conditions of Parole):

> 1. You shall not leave the geographic limits fixed by the I-94 without written permission from the INS District Director. . . .
>
> 7. You shall abide by the curfew rules established by the resettlement program. . . .

unpalatable but also untenable to conclude that under the Due Process Clause of the Fifth Amendment persons living in the United States—whether by our choice or not—could be subjected to a life sentence in prison simply because their country of origin will not have them back. A life sentence in prison, in fact, seems to us no less impermissible than the government's torture or summary execution of these aliens.

The government also argues that in *Mezei*, the Supreme Court held that the indefinite detention of an excludable alien was permissible under the Due Process Clause of the Fifth Amendment, and the government further argues that the *Zadvydas* Court reaffirmed *Mezei*. We note at the outset that the *Zadvydas* Court explicitly refused to address the continuing validity of *Mezei*: "we need not consider the aliens' claim that subsequent developments have undermined *Mezei's* legal authority." *Zadvydas*, 533 U.S. at 694. Inasmuch as the Court in *Mezei* permitted the potentially indefinite detention of an excludable alien, however, we agree with the government that we must address *Mezei's* ramifications for Rosales and Carballo.[32] We

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11. You shall not have visitors on the premises of the resettlement program without the permission of the Program Director.

Rosales Supp. J.A. at 4.

[32] We note that we believe that the government considerably overstates the holding of *Mezei*. In its brief before the district court, the government described the Court's holding in *Mezei* as follows: "[The Court] held that the 'continued exclusion' via detention of an inadmissible alien does 'not * * * deprive[ ] him of any statutory or constitutional right,' *even when custody is prolonged* because no other country is willing to accept the alien." Gov't Br. re Rosales at 20 (quoting *Mezei*, 345 U.S. at 208-10, 215-16) (emphasis added). In *Mezei*, an excludable alien was denied

believe that *Mezei* does not govern the outcome of the instant cases for two reasons. First, the *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security.[33] The Court, in fact, located the

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reentry into the United States at Ellis Island and ordered excluded; because other countries would not take him in, Mezei was detained on Ellis Island. After one year of detention, Mezei filed a habeas petition in a federal district court claiming that his exclusion without a hearing violated his constitutional rights under the Due Process Clause of the Fifth Amendment. *Mezei*, 345 U.S. at 207. The Supreme Court held that Mezei, as an excludable alien, was not entitled to a hearing: "Whatever the *procedure* authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (quotation omitted) (emphasis added); *see also Kim Ho Ma v. Reno*, 208 F.3d 815, 823 (9th Cir. 2000), *vacated and remanded sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001) ("In *Mezei*, the Court relied on the entry fiction . . . in holding that an excludable alien is not entitled to procedural due process."). The *Mezei* Court then went on to hold that "we do not think that respondent's *continued exclusion* deprives him of any statutory or constitutional right." *Id.* at 215 (emphasis added). We believe that the Court in *Mezei*, therefore, did not address indefinite or potentially indefinite *detention* as a violation of Mezei's substantive due process rights. Inasmuch as Rosales and Carballo do not challenge their exclusion, we believe that their cases present a different question. We recognize, however, that other circuits have not read *Mezei* in this way. *See, e.g., Carrera-Valdez*, 211 F.3d at 1048 (stating that the *Mezei* Court "held that an excludable alien may be detained indefinitely when his country of origin will not accept his return"); *Kim Ho Ma*, 208 F.3d at 823 ("[T]he Court held that Mezei could be detained indefinitely on Ellis Island."). Moreover, the Court in *Zadvydas* noted that "*Mezei*, like the present cases, involves indefinite detention." *Zadvydas*, 533 U.S. at 693. Therefore, we address *Mezei* as "it involves indefinite detention."

[33] According to the Court, Mezei's exclusion "rested on the finding that [his] entry would be prejudicial to the public interest

Attorney General's authority to exclude and detain Mezei in the Passport Act of 1918. *Mezei*, 345 U.S. at 210-11 ("Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife. That authorization, originally enacted in the Passport Act of 1918, continues in effect during the present emergency."). Moreover, in regard to the proposition that Mezei be released on immigration parole, the Court stated: "An exclusion proceeding *grounded on danger to the national security* . . . presents different considerations; neither the rationale nor the statutory authority for such release exists." *Id.* at 216. Particularly in a post-September 11 world, we recognize that in special circumstances prolonged post-removal-period detention may be warranted. *See Zadvydas*, 533 U.S. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."). There are, however, no special circumstances involving national security in the instant cases.

Second, we believe that the Court's implicit conclusion in *Mezei* is eclipsed by the conclusion drawn

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for security reasons." *Mezei*, 345 U.S. at 208. The Court did not explain the precise nature of the security threat, but *Mezei* was decided during the Korean War, and the Court did specifically note that Mezei "left the United States and remained behind the Iron Curtain for 19 months." *Id.* at 214. In addition, Justice Jackson in dissent, stated that: "[M]y apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else." *Id.* at 227 (Jackson, J., dissenting).

from the *Salerno* line of cases that the indefinite detention of excludable aliens does raise constitutional concerns. All of the cases that the *Zadvydas* Court relied on in assessing the constitutional due process concerns implicated by the indefinite detention of aliens who are removable on grounds of deportability were decided after *Mezei*. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Jackson v. Indiana*, 406 U.S. 715 (1972). In these cases, the contours of constitutionally permissible civil detention are rigorously delineated—a substantial jurisprudential development from the time that *Mezei* was decided. As we explained above, the *Zadvydas* Court held on the basis of these cases that civil detention is constitutionally permissible only "in certain special and narrow non-punitive circumstances where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690. As we also explained above, we do not believe that any such special circumstances outweigh Rosales's and Carballo's interest in avoiding indefinite and potentially permanent INS detention. Although we must—as a lower federal court—apply all pertinent Supreme Court precedent, it is not our role to reconcile cases whose application leads to opposite conclusions.[34] Therefore,

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[34] We note that a possible means of reconciling *Mezei* and the *Salerno* line of cases is to limit *Mezei* to a decision involving national security risks. In *Salerno*, the Court specifically stated that national emergencies could constitute a special justification that would outweigh an individual's constitutionally protected liberty interest. *See Salerno*, 481 U.S. at 748 ("[I]n times of war or insurrection, when society's interest is at its peak, the Government

to the extent that we could conclude, in reliance on the Court's holding in *Mezei*, that the indefinite detention of excludable aliens is constitutionally permissible, we believe such a conclusion to be fatally undermined by the Court's later decisions in the *Salerno* line of cases.

3. Statutory Construction of § 1231(a)(6) as Applied to Excludable Aliens

"[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). Therefore, prior to construing § 1231(a)(6) (2000) to contain a reasonable time limitation, the *Zadvydas* Court addressed whether Congress had clearly indicated an intent in the statute to authorize indefinite post-removal-period detention of aliens whose removal cannot be effected. *Zadvydas*, 533 U.S. at 696-99. After reviewing the history of the statute, the Court concluded that "[w]e have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. We again see no reason to interpret the statute any differently for excludable aliens.[35]

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may detain individuals whom the government believes to be dangerous.").

[35] We reiterate that in enacting IIRIRA, Congress itself abolished the distinction between deportable and excludable aliens. *See infra* [*sic*] note 1.

Like the Supreme Court in *Zadvydas*, then, we recognize six months as a presumptively reasonable period for the post-removal detention of excludable aliens. "After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701. In the instant cases, we conclude that there is no significant likelihood of removal in the reasonably foreseeable future. Although the government presented evidence of our continuing negotiations with Cuba over the return of Cuban nationals excluded from the United States, neither Rosales nor Carballo is currently on a list of persons to be returned.

III. CONCLUSION

Under either the Supreme Court's construction in *Zadvydas* or our construction in regard to excludable aliens, we read 8 U.S.C. § 1231(a)(6) (2000) to contain an implicit reasonable time limitation. Because there is no significant likelihood that Rosales and Carballo will be removed in the reasonably foreseeable future and because the INS has detained them longer than six months, we conclude that the INS's detention of Rosales and Carballo is no longer reasonable and is therefore not authorized by IIRIRA's post-removal-period detention provision. We **REVERSE** the district courts' denials of Rosales's and Carballo's habeas petitions, and we **REMAND** for proceedings consistent with this opinion.

DISSENT

BOGGS, Circuit Judge, dissenting.

In deciding these two consolidated cases today, the court makes two holdings that are both quite striking, novel and, in my opinion, incorrect. I therefore respectfully dissent. The court first finds that Congress, in the course of enacting a statute that virtually all concede was designed to tighten immigration procedures, instead amended the statute in such a way as to obliterate a longstanding distinction that recognized the lessened constitutional protection of persons who had been affirmatively denied entry into the United States, detained at the border, and physically allowed inside the country only as a matter of legislative grace. Instead, the court finds that Congress deliberately accorded such persons the same status as long-time permanent residents. Second, and perhaps even more disturbing, the court essentially accords such persons *all* of the due process rights of American citizens. The court therefore makes it impossible, in our circuit at least, for the United States government to detain for more than six months any number of aliens who present themselves at our border and are denied entry, or are paroled into the United States only conditionally. It further extends this status regardless of whatever criminal acts those persons may have committed. I believe that this result cannot be derived from the text of the Constitution and is contrary to existing Supreme Court precedent, which the Supreme Court has recently explicitly relied on and refused to overrule.

To begin with the broader holding, the court finds that full due process applies to all persons at or within the borders of the United States, and that such due process is not merely procedural, but essentially accords any such person a right to remain at liberty in the United States comparable to that accorded to United States citizens. It does this by commencing with the unremarkable proposition that the government may not wantonly execute or torture a person, and then extrapolates that the government is disabled from applying its immigration and criminal laws to such excludable aliens in ways that are different from those that apply to deportable aliens.

This holding has nothing to do with what we would generally classify as "process." Rosales and Carballo have had that, in abundance. They have been able to argue, before independent arbiters, that they are not the persons to whom the law is intended to apply, that they do not come within the reach of the law, and any other procedural issues they may wish to raise. They have had this review before the various levels of the administrative bureaucracy prescribed by Congress and before the courts of the United States. It cannot be disputed that Rosales and Garcia are both "excludable" aliens in that they sought admission to the United States, were detained at the border before entering the United States, and were paroled into the United States only as a matter of grace and on the condition that their parole may be revoked at any time, and especially for the commission of criminal offenses.

All of the many agencies and courts to have considered their cases have ruled that they come within the mandate of Congress that persons who are "excludable" and have committed crimes of sufficient serious-

ness should be removed from the United States and, if not immediately deportable, be detained at the discretion of the Attorney General. There is little doubt that Carballo and Rosales fit in this category of excludable aliens who have committed serious offenses. Simply to detail the crimes of which they have been convicted, and others of which they have been arrested, makes this abundantly clear. The highlights of Rosales's criminal career include arrests for aggravated battery, possession of marijuana, burglary and loitering and convictions for possession of marijuana, resisting arrest, grand theft, burglary, grand larceny, escape from a penal institution, and conspiracy with intent to distribute cocaine. Op. at 6. Carballo, no less prolific, has been arrested for aggravated assault, burglary, grand larceny, battery, carrying a concealed weapon and an unlicensed firearm, trespass, and possession of marijuana. He has been convicted of attempted first-degree murder, aggravated assault with a deadly weapon, and robbery. Op. at 8. If this law cannot be applied to these persons, it seems clear that no alien, no matter his degree of criminality, can be subject to this law.

The court provides a number of soothing statements as to how certain actions against such aliens might be permissible, but it provides no principled reasons for such distinctions, nor a square holding that in fact they can be implemented. May parole conditions for excludable alien criminals be more onerous than for citizens? It implies that they may be, by referring to parole conditions and practices applied to Rosales that are not (and constitutionally may not be) applied to criminals on parole. Op. at 12 & nn.7-8. However, the opinion provides no basis for such a distinction. May

Congress prescribe indefinite detention as a punishment for any violation of such conditions when similar punishment does not apply to citizen parole-violators? No answer is given. A careful reading of the court's logic and rhetoric would indicate that the very same type of attack that is mounted against the congressional mandate here would be found congenial by this court when mounted against any such distinction. Would any more draconian punishment, such as that suggested above, or an enactment that excludable aliens could be detained indefinitely as punishment for any criminal infraction, pass the muster of this court, under its broad rubric of due process, or under its application of the Eighth Amendment? In oral argument, it was indicated that any violation of parole, under current law, was punishable by at most one year's additional detention. Would it violate the Ex Post Facto Clause for any alien already excluded from this country to have applied to him indefinite detention? Again, no logic is given that would answer the question.

The court's approach leads to a host of practical problems, both at the level of this circuit and of the nation. As the court indicates, we have jurisdiction only because the INS happened to choose to detain these aliens within the boundaries of this circuit, at FCI Memphis and at Lexington. Op. at 7, 9. Since our holding is generally at odds with those of most other circuits, and explicitly at odds with four other circuits, it may well be that the INS will simply choose to remove from the Sixth Circuit all those aliens to whom this dictate would apply. *Carrera-Valdez v. Perryman*, 211 F .3d 1046, 1048 (7th Cir. 2000); *Ho v. Greene*, 204 F.3d 1045, 1054-55 (10th Cir. 2000); *Chi Thon Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999); *Guzman v.*

Tippy, 130 F.3d 64, 66 (2d Cir. 1997); *see also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1445 (9th Cir. 1995); *Gisbert v. Attorney General*, 988 F.2d 1437, 1448 (5th Cir.), *amended by* 997 F.2d 1122 (5th Cir. 1993) (per curiam); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1449-51 (11th Cir. 1993); *Palma v. Verdeyen*, 676 F.2d 100, 103-04 (4th Cir. 1982).

As against these newly minted rights, we have long-standing and clear Supreme Court precedent. The Supreme Court, in determining the scope of due process rights of aliens, has consistently distinguished between deportable and excludable aliens. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court definitively held that excludable aliens, unlike aliens who are merely deportable, have no constitutional right against indefinite detention in the event that they cannot be returned to their country of origin. Indeed, the circumstances of Mezei were far more compelling than those of Rosales and Carballo. Mezei had committed no crime. He had been a longtime resident of the United States, and had always been law abiding during that time. He simply went abroad for a period of 19 months, and was detained at the border when he returned. The Supreme Court held that he could be detained indefinitely, if no country could be found to take him.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court reinforced the distinction between excludable and deportable aliens. There, the Court suggested that deportable aliens may have a constitutional right against indefinite detention. *Id.* at 682 (suggesting that "indefinite detention beyond the time necessary for removal" of deportable aliens "would raise serious constitutional concerns"). But the Court

carefully restricted its concerns to deportable aliens. As the Court explained, "the distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Id.* at 691. Specifically, the Court recognized again that "it is well established that certain constitutional protections available to persons inside the United States are unavailable to persons outside of our geographic borders," including those who have not formally "entered" the United States, such as excludable aliens paroled into the United States. *Ibid.*

The Supreme Court specifically indicated that it was not questioning the validity of *Mezei*, and noted that the case of *Zadvydas* "differed in a *critical* respect" from *Mezei* exactly because Mezei had been detained at the border, while Zadvydas had entered the United States. *Id.* at 693 (emphasis added). The Supreme Court has recently and emphatically instructed us that we should leave the overruling of Supreme Court precedents to that Court, even if we believe, or divine, that the Court should, or will, overrule them. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). No matter how much the court may disagree with the distinction between excludable and deportable aliens, it simply cannot be disputed that the controlling Supreme Court precedent makes that distinction and holds that excludable aliens do not have a constitutional right to be permitted to remain in the United States at liberty if their removal cannot be seasonably obtained.[1]

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[1] One of the most perceptive commentators on *Mezei* argued eloquently for a more nuanced approach that would elide and break down this rigid distinction, based on a number of interesting factors. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v.*

The court's holding, applying as it does to persons with very extensive criminal records, would obviously apply to persons otherwise blameless, who have simply been detained attempting to enter the United States: After a maximum of six months, if such persons can not be sent elsewhere, they would have to be released into the United States, with some possible exception for individualized determinations. Thus, if hundreds, or thousands, or hundreds of thousands of such persons present themselves at our borders, this court holds that the government of the United States is constitutionally disabled from doing anything, after a short interval, other than set all such persons at liberty in our country. While this result could be good policy, it seems inconceivable that such a disabling of congressional policy choices is consistent with a fair reading of the Immigration and Naturalization Clause of the Constitution, *see, e.g., Galvan v. Press*, 347 U.S. 522, 531 (1954) ("That the formulation of [policies pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"), or with the intent of anyone in adopting the Fifth and Fourteenth Amendments. The process that is due to persons to whom the government has explicitly denied entry into the country is quite different from what is due to others, as a matter of constitutional law.

Turning to the statutory argument, the court essentially makes two points. The first is that since the language of IIRIRA uses the term "inadmissible," it

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Davis, 2001 Sup. Ct. Rev. 47. However, at every step of his article he takes it as a given that the distinction still has vitality, for the time being.

has, therefore, abolished the distinction between excludable and deportable aliens, for all purposes. Op. at [36a-37a]. The court also remarkably concludes, by holding that the statute does not permit indefinite detention for excludable aliens as well, that Congress abolished the distinction with the result of giving excludable aliens the same rights as deportable aliens. Of course, Congress had quite the contrary intention: it sought to tighten immigration regulations. As Congress itself provided in the text of the statute, courts were not to construe IIRIRA to "create any procedural right or benefit that is legally enforceable." 8 U.S.C. § 1231(h). The intent of Congress is clear that it had intended, by using the language of "inadmissibility," to subject deportable aliens to the same potential for indefinite detention, if they could not be removed after the commission of a serious crime, that excludable aliens had been subject to both statutorily and constitutionally for years.

The court's development of a "reasonable time" limitation for the detention of "excludable" aliens is based wholly on the Supreme Court's effective rewriting of the statute *for deportable aliens*, which is all that the Court had before it in *Zadvydas*. Applying this reasonable time limitation to excludable aliens misunderstands the Supreme Court's analysis in *Zadvydas* and, more fundamentally, the canon of constitutional avoidance. The Court in *Zadvydas* did not hold that the text, or even the legislative history, of the statute indicated Congress's intent to place a reasonable time limitation on the detention of "deportable" aliens. 533 U.S. at 697-98. Instead, the Court employed the canon of construction that Congress does not intend for its statutes to raise serious constitutional problems,

also known as the canon of constitutional avoidance. *Id.* at 698. Specifically, the Court relied on the statutory text that the Attorney General "may" detain individuals after the removal period. *Id.* at 697. For the Court, this permissive language did not necessarily confer unfettered discretion on the Attorney General to detain aliens, but must have meant, because of the canon of constitutional avoidance, that the Attorney General should exercise his discretion within constitutional limits. Of course, as demonstrated above, governing Supreme Court precedent, including *Zadvydas*, clearly indicates that there is no constitutional limit on the detention of excludable aliens. Thus, the Attorney General "may," in his discretion, detain excludable aliens beyond the ninety-day removal period, and the detention need not comply with the reasonable time limitation that cabins his discretion with regard to deportable aliens arising from the canon of constitutional avoidance and nothing else.

Indeed, its merits aside, the canon of constitutional avoidance has historically contemplated precisely such a result. From the beginnings of statutory construction in federal courts, the Supreme Court has held that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *See NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979) (discussing the opinion of Chief Justice Marshall in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)). The canon of constitutional avoidance is a majoritarian default rule. That is, the canon draws its legitimacy from the premise that Congress generally does not intend for its statutes to exceed constitutional limits. But this supposition cannot be significantly expanded without straining the justifi-

cation beyond reason. Congress often intends to legislate *to*, even if not *beyond*, the limitations of the Constitution. If the canon of constitutional avoidance is to be justifiable, it must at least permit Congress to legislate to the limits of what is constitutionally permissible.

There is no textual source for the Supreme Court's application of a specific time limitation to the Attorney General's discretion to detain aliens under IIRIRA. Instead, the word "may" on which the Supreme Court focused in *Zadvydas*, if the canon of constitutional avoidance is to have any meaning, permits the Attorney General to detain beyond the removal period, but only as allowed by the Constitution. And the Supreme Court is clear that the Constitution does not grant "excludable" aliens a right to release into the United States after a "reasonable time." Thus, that "deportable" aliens may only be detained for a "reasonable time" after the removal period but "excludable" aliens may be detained indefinitely is not only a consistent, but the required, reading of § 1231(a)(6) in the context of the canon of constitutional avoidance.

In contrast, our court's holding that extends the "reasonable time" limitation to excludable aliens is a classic example of the tail wagging the dog. The Supreme Court rewrites a statute with respect to one class of persons, to avoid constitutional doubts, and we are then required to read the statute in the same way in cases where there are no constitutional doubts. This does not follow.

I freely grant that there is some anomaly in having the same words mean different things when applied to different groups of people. However, that is a natural consequence of an aggressive application of the constitutional-doubt standard, implemented by a con-

ceded rewriting of the statute, rather than by choosing between plausible alternatives. And, while certainly not conclusive, the fact that the Supreme Court chose to vacate our previous decision in *Rosales-Garcia*, which followed the same logic as the court displays today, is some indication that that result is not lambently clear to the Supreme Court. *Thoms v. Rosales-Garcia*, 534 U.S. 1063 (mem.), *vacating and remanding Rosales-Garcia v. Holland*, 238 F.3d 704 (6th Cir. 2001).

Interestingly, Justice Kennedy noted this dilemma in his dissenting opinion. He did characterize both alternatives as unsustainable, but the nature of the situation requires us to accept one or the other. *Zadvydas*, 533 U.S. at 710-11 (Kennedy, J., dissenting). Under these circumstances, I believe it does far less violence to the language of the statute, to congressional intent, and to a proper understanding of the canon of constitutional avoidance to confront the words of the statute and interpret them according to their tenor, in a case where any "constitutional doubt" is far less than in *Zadvydas*, assuming that there is any doubt whatsoever.

In short, today's decision, perhaps out of a misplaced concern for the individuals before us, grossly distorts the meaning of a statute, and greatly diminishes the range of policy choices available to the political branches in a field uniquely committed to their discretion. Whether indefinite detention of persons as incorrigible as Rosales and Carballo is good policy is not for us to decide. It is a matter for Congress, subject at most to a requirement that some procedural fairness be applied under the Due Process Clause, a requirement that has been amply fulfilled.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5683

MARIO ROSALES-GARCIA, PETITIONER-APPELLANT

v.

J.T. HOLLAND, WARDEN, RESPONDENT-APPELLEE

Submitted: Aug. 4, 2000
Decided and Filed: Jan. 31, 2001

Before: MOORE and CLAY, Circuit Judges; RICE, District Judge.*

MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. RICE, D.J. (pp. [112a-139a]), delivered a separate dissenting opinion.

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* The Honorable Walter Herbert Rice, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

MOORE, Circuit Judge.

This case presents the difficult and complex question whether an excludable alien has a liberty interest recognized by the Fifth Amendment's Due Process Clause when the Immigration and Naturalization Service ("INS") seeks to detain him in custody, perhaps indefinitely, without charging him with a crime or affording him a trial but simply on the ground that it cannot effect his deportation. On July 9, 1998, Petitioner-Appellant Mario Rosales-Garcia ("Rosales") applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Kentucky. He sought relief from the Attorney General's decision on March 24, 1997 denying him parole from his detention at the Federal Medical Center in Lexington, Kentucky, or in the alternative, an emergency hearing before the Cuban Review Panel and the INS. Rosales is a Cuban citizen who arrived in this country during the Mariel boatlift in 1980. Because he has been declared excludable by the INS he would ordinarily be deported to his home country; however, the United States is unable to effect his deportation because Cuba refuses to accept his return. Thus, Rosales, after completing a federal prison sentence, has been taken into INS custody pending an agency determination that he is eligible for parole or that Cuba will allow him to enter. Rosales, appearing *pro se*, asserts that both his substantive and procedural due process rights under the Constitution are being violated by the Attorney General and the INS. The district court dismissed his petition with prejudice, and Rosales promptly appealed to this court. We **REVERSE**

the district court's judgment, order Rosales's release, and **REMAND** to the district court for proceedings in accordance with this opinion.

I. Background

A. Facts and Procedure

Rosales left Cuba, his birthplace, and arrived in this country around May 6, 1980 as part of the Mariel boatlift, so known because over 120,000 undocumented Cubans departed from the Mariel Harbor en route to the United States. Although Rosales was initially detained by immigration authorities, he was released into the custody of his aunt on May 20, 1980, pursuant to the Attorney General's authority to parole illegal aliens for humanitarian or other reasons under 8 U.S.C. § 1182(d)(5)(A) (1994).[1] J.A. at 97-110 (Request for Asylum, Passport). Rosales was subsequently arrested multiple times[2] and was convicted of several of the

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[1] The statute read in pertinent part: "The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A) (1994) (amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 602(a), Pub. L. 104-208, 110 Stat. 3009 (1996)).

[2] Rosales was first arrested in 1980 for aggravated battery. That charge was dismissed. J.A. at 145. He was arrested for other offenses, including possession of marijuana, burglary, and loitering,

offenses including: possession of marijuana and resisting arrest in October 1981, J.A. at 146-47; grand theft in September 1981, for which he received two years' probation in March 1983, J.A. at 174; burglary and grand larceny in October 1983, for which he received two six-month sentences to be served concurrently, J.A. at 152-53, 175; and escape from a penal institution in February 1984, J.A. at 177, where he had been serving time for his previous convictions. On January 9, 1986, Rosales received a sentence of 366 days for the escape charge after he pleaded guilty. J.A. at 155, 181.

Rosales's immigration parole was revoked on July 10, 1986 by the INS, pursuant to its authority under 8 U.S.C. § 1185(d)(5)(A) and 8 C.F.R. § 212.5(d)(2), for the escape and grand larceny charges. J.A. at 111-13. In a separate proceeding before an immigration judge in Atlanta, Georgia, on June 26, 1987, Rosales was denied asylum and deemed excludable[3] from this country be-

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but apparently he was not convicted of those offenses. J.A. at 147-54.

[3] Before the enactment of IIRIRA, aliens ineligible for admission into the United States were designated "excludable" aliens. See 8 U.S.C. § 1182(a) (1994). Excludable aliens who were granted "parole" by the Attorney General could then enter the country. If an excludable alien's parole was revoked, exclusion proceedings would be brought to deport him. *See* 8 U.S.C. § 1182(d)(5)(A) (1994). These aliens are now referred to as "inadmissible" aliens. *See* 8 U.S.C. § 1182(a). Aliens who had gained admission into the United States but were here illegally were designated "deportable" aliens. *See* 8 U.S.C. § 1251 (1994). They could be removed from this country by deportation proceedings. *See* 8 U.S.C. § 1252 (1994). Proceedings to remove both inadmissible and deportable aliens are now referred to as "removal" proceedings. *See* 8 U.S.C. § 1229a. Inadmissible aliens are

cause he lacked a visa or other documentation entitling him to admission and because he had been convicted of state crimes in Florida. J.A. at 115. Rosales remained in immigration custody until he was considered for immigration parole a second time on April 5, 1988. J.A. at 120. He was released on May 20, 1988 to the custody of his uncle in Miami. J.A. at 122-25. Rosales was not deported at that time, however, because Cuba refused to take him back.

On March 18, 1993, Rosales pleaded guilty to one count of conspiracy to possess with the intent to distribute cocaine in the United States District Court for the Eastern District of Wisconsin; he was sentenced to 63 months in federal prison, followed by five years of supervised release. J.A. at 159-61. While Rosales was serving his sentence, the INS lodged a detainer against him, directing prison officials to release him to INS custody for deportation proceedings at the completion of his sentence. J.A. at 126-27. On March 24, 1997, prior to his release, Rosales's immigration parole was again revoked pursuant to the regulations governing parole of Mariel Cubans at 8 C.F.R. § 212.12 (the "Cuban Review Plan").[4] *See* 8 C.F.R. § 212.12(a). When

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removable under 8 U.S.C. § 1227(a)(1)(A). Under the prior statutory scheme, Rosales was an "excludable" alien.

[4] Because of the lack of an agreement with Cuba for the return of Mariel Cubans, the Attorney General adopted the Cuban Review Plan, at 8 C.F.R. §§ 212.12-.13, in 1987 to govern the grant and revocation of parole to all Cubans who arrived in the United States between April 15, 1980 and October 20, 1980. Under the Plan, the authority to grant parole for detained Mariel Cubans rests with the INS Commissioner, who may act through an Associate Commissioner for Enforcement. *See id.* § 212.12(b)(1). The Associate Commissioner must appoint a Review Plan Director who designates two- or three-person panels (the "Cuban Review

Rosales was released from prison on May 18, 1997, the INS promptly detained him and took him into custody, pursuant to its authority under 8 U.S.C. § 1226(e) (1994).[5] On November 5, 1997, the Associate Commissioner for Enforcement for the INS reconsidered and then denied Rosales immigration parole. J.A. at 133. The INS rendered its decision on December 12, 1997 and served it on Rosales on February 11, 1998. According to its report, the Cuban Review Panel deter-

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Panel") to make parole recommendations to the Associate Commissioner. The regulations provide for the annual review of a detainee's status. *See id.* at § 212.12(g)(2). Before making a recommendation that a detainee be granted parole, the Cuban Review Panel members "must conclude that: [1] The detainee is presently a nonviolent person; [2] The detainee is likely to remain nonviolent; [3] The detainee is not likely to pose a threat to the community following his release; and [4] The detainee is not likely to violate the conditions of his parole." *Id.* § 212.12(d)(2).

Each panel must weigh the following factors when making its decisions: "[1] The nature and number of disciplinary infractions or incident reports received while in custody; [2] The detainee's past history of criminal behavior; [3] Any psychiatric and psychological reports pertaining to the detainee's mental health; [4] Institutional progress relating to participation in work, educational and vocational programs; [5] His ties to the United States, such as the number of close relatives residing lawfully here; [6] The likelihood that he may abscond, such as from any sponsorship program; and [7] Any other information which is probative of whether the detainee is likely to . . . engage in future acts of violence, . . . future criminal activity, or is likely to violate the conditions of his parole." *See id.* § 212.12(d)(3).

[5] The statute provided, in pertinent part, that "the Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien" from criminal confinement. 8 U.S.C. § 1226(e) (1994). The parties do not dispute that Rosales's conviction for conspiracy to possess with intent to distribute cocaine was an "aggravated felony" under the statute.

mined that Rosales had demonstrated "a propensity to engage in recidivist criminal behavior" as reflected by his criminal record and that his responses to questions at his parole interview were "non-credible." J.A. at 133. The Panel stated that "it is not clearly evident" that releasing Rosales on parole was in the public interest; that he would not pose a threat to the community; or that he would not violate the conditions of immigration parole.[6] J.A. at 133. Rosales has remained in custody since that determination, where he continues to receive periodic consideration for parole under the Cuban Review Plan.[7] *See* 8 C.F.R. § 212.12(g)(2).

Rosales filed his habeas petition with the district court on July 9, 1998. J.A. at 5. In his petition, Rosales asserted that his due process rights under the Fifth and Fourteenth Amendments were violated because he was denied his right to be represented by counsel at the Cuban Review Panel hearing on his parole status; to review the information used against him at that proceeding; and the right to confront and cross-examine witnesses. Rosales also alleged that the Cuban Review Panel improperly assessed his prior convictions when it calculated his "score" in its assessment of his candidacy for parole, in violation of the regulations governing the Review Panel, at 8 C.F.R. §§ 212.12-13. Finally,

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[6] The Review Panel worksheet also reveals that Rosales has demonstrated "good conduct" while in custody and that he has participated in English as a Second Language classes, a drug rehabilitation program, industrial training, automotive training, and has received his GED equivalency. J.A. at 137.

[7] As of July 19, 2000, Rosales had been determined to be releasable by the INS pending placement in a suitable halfway house. The effect of this determination is discussed infra.

Rosales asserted that the decision by the INS was an abuse of discretion, arbitrary and capricious, and that it violated Supreme Court precedent. Rosales sought immediate release on parole, or in the alternative, an emergency hearing at which he would be afforded procedural due process rights.

On October 1, 1998, the district court dismissed the habeas petition sua sponte, concluding that "the petitioner is not being held in violation of the U.S. Constitution or any U.S. law, rule or regulation; thus, the petitioner is not entitled to habeas relief." J.A. at 66, 70. Rosales then filed a motion to alter or amend the judgment on October 21, 1998, stating that he meant to assert his due process rights, not under the Constitution, but under 8 U.S.C. §§ 1101, 1105(a) and 5 U.S.C. §§ 551-701 as well as Supreme Court precedents. J.A. at 13. The district court, construing *pro se* petitions leniently, vacated its earlier decision to dismiss and granted Rosales's motion for reconsideration on December 1, 1998, allowing the case to proceed. J.A. at 71-73.

The government filed a response to Rosales's petition on February 4, 1999, arguing that this case is identical to those that have been rejected by other circuits, including the Sixth Circuit in an unpublished opinion, *Gonzalez* v. *Luttrell*, No. 96-5098, 1996 WL 627717 (6th Cir. Oct. 29, 1996). The government noted that Rosales had received all the procedure due under the Cuban Review Plan and that his parole had been appropriately denied by the Attorney General. Rosales responded to the government by again asserting his right to be free from indefinite detention and to be afforded procedural due process rights at his parole hearings. J.A. at 58-65. Rosales also sought the appointment of counsel through

a motion to the district court, but that request was denied on February 23, 1999. J.A. at 75.

The district court dismissed Rosales's amended petition with prejudice on May 3, 1999. The district court, addressing Rosales's statutory claims first, concluded that Congress had granted total discretionary authority to the Attorney General over immigration matters at 8 U.S.C. §§ 1103(a)(1)[8] and 1182(d)(5)(A). After surveying the recent amendments to the immigration laws and noting Congress's intent to provide the Attorney General with more discretion to detain aliens, the district court concluded that "the Attorney General may continue to detain the instant petitioner in conformity with federal law." J.A. at 88-89 (D. Ct. Op.)

The district court also concluded that Rosales had failed to state a cognizable constitutional claim. The court determined that the Sixth Amendment is not applicable to Rosales's petition "because 'immigration proceedings and detention do not constitute criminal proceedings or punishment.'" J.A. at 89 (internal citations omitted). The court next found that the Fifth Amendment does not "provide excludable aliens with procedural due process rights with regard to admission or parole." J.A. at 89. Thus, the court concluded that

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[8] This statute provides that "[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1).

Rosales was not due any of the procedures which he sought, namely the right to counsel, to review the information used against him, or to confront and cross-examine people who provided information at his parole hearing. Although the district court noted that "the law is less clear about the extent to which any substantive due process rights are enjoyed by excludable aliens," the court denied Rosales the benefit of the protection of the substantive component of the Fifth Amendment as well. J.A. at 90. The district court observed that Rosales "has no fundamental right to be free to roam the United States and a fundamental right is the first component of a substantive due process claim." J.A. at 91. The court also found that Rosales's continued detention was "neither arbitrary, conscience-shocking nor oppressive in the constitutional sense." J.A. at 91. Rosales then filed a prompt notice of appeal to this court. J.A. at 95.

In his four-page *pro se* brief to this court, Rosales does not challenge the Attorney General's right to exclude him. Rather, Rosales argues that he should be granted procedural due process rights during his parole revocation hearing and that his substantive due process rights are being violated by the indefinite nature of his detention. In response to the district court's assertion that an excludable alien is not free to "roam" this country, Rosales asserts that he "is not asking for permission to 'roam' the United States." Instead, he claims that he would return to Cuba and that "[i]f he was not part of this 'Catch 22', where he is not allowed to return to his country, he [would] gladly do so." Appellant's Br. at 3.

B. Relations With Cuba

A brief background on the United States' relationship with Cuba is essential to our analysis. Most of the 125,000 Cuban refugees who came to this country in 1980 in the Mariel boatlift were found excludable because they arrived here without proper entry documents or because they had committed crimes in Cuba. However, a large percentage of these Cubans, including Rosales, were paroled, pursuant to the Attorney General's authority under 8 U.S.C. § 1182(d)(5). According to the affidavit of Michael E. Ranneberger, the Coordinator of the Office of Cuban Affairs in the State Department, who has been responsible for negotiations with Cuba since 1995, "[f]or almost two decades, the United States has been discussing with Cuban authorities the issue of return of excludable Cubans." J.A. at 56. The United States reached a limited agreement with Cuba to repatriate Mariel Cubans in December 1984. Under the terms of this agreement, Cuba consented to the return of 2,746 excludable aliens from the Mariel Boatlift, at the rate of 100 per month, whom the INS was able to identify at the time the agreement was reached. J.A. at 56 (Ranneberger Decl.); 81 (D.Ct.Op.). Rosales was not among those named in the 1984 Agreement because he was not declared excludable until 1987. Cuba suspended the agreement in May 1985, but agreed to reinstate the agreement in November 1987. *See Gisbert v. U.S. Attorney Gen.*, 988 F.2d 1437, 1440 (5th Cir. 1993). As of January 1999, 1400 Cubans had been returned to Cuba. J.A. at 56 (Ranneberger Decl.).

Further talks between the two countries took place on September 9, 1994 and May 2, 1995. J.A. at 57 (Ranneberger Decl.). The September 1994 agreement

stated that the United States and Cuba "agreed to continue to discuss the return of Cuban nationals excludable from the United States." J.A. at 57. Ranneberger noted that discussions between the two countries continued periodically, and while he cannot offer details from these sensitive discussions, he says that he "can confirm that the return of Cuban nationals . . . remains under discussion between the two governments." J.A. at 57.

The United States is currently detaining approximately 1,750 Mariel Cubans in U.S. prison facilities who are neither eligible for parole nor deportable because Cuba will not accept them. *See Chi Thon Ngo* v. *INS*, 192 F.3d 390, 395 (3d Cir. 1999). According to the government, the United States' position has been and currently is that Cuba is required to take back all of its nationals who are denied admission to the United States. Appellee's Br. at 19.

II. Jurisdiction

The government challenged the district court's jurisdiction to hear Rosales's 28 U.S.C. § 2241 habeas petition based on 8 U.S.C. §§ 1252(g)[9] and 1231(h)[10], as

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[9] This section provides: "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter." 8 U.S.C. § 1252(g).

[10] This section provides: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h).

well as § 1226(e)[11] and conflicting case law. The district court determined that, in light of this court's decision in *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997), and the absence of further clarification from this court or the Supreme Court, it had jurisdiction to hear the petition.[12] The government appears to have conceded this court's jurisdiction to hear the instant appeal. Appellee's Br. at 2 (stating that the court of appeals' jurisdiction arises under 28 U.S.C. §§ 1291 and 2253). However, it is our obligation to address the predicate question of our jurisdiction, even when it is not contested, before turning to the merits of these appeals. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 137 L.Ed.2d 170 (1997).

The Supreme Court's recent decision in *Reno v. American-Arab Anti-Discrimination Committee ("AADC")*, 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999), makes clear that the district court was correct to assert jurisdiction over Rosales's habeas petition; it also establishes the propriety of our jurisdiction to hear Rosales's claim. In *AADC*, the Supreme Court

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[11] This section provides: "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e).

[12] In *Mansour*, this court noted that because habeas relief was available to aliens seeking review of final deportation orders, the statute denying any court's jurisdiction to review those orders was constitutional. However, this court left undecided the scope of habeas review available to such aliens. *See Mansour*, 123 F.3d at 426 n.3 ("[W]e need not address the scope of review that is available on a petition for a writ of habeas corpus.").

addressed the scope of 8 U.S.C. § 1252(g) and its ostensibly sweeping jurisdiction-stripping language.[13] Forced to reconcile the incongruity of several provisions of the IIRIRA which simultaneously grant and deny the right of judicial review to certain aliens who were in deportation proceedings before April 1, 1997, the Supreme Court determined that § 1252(g) must have a "narrow[ ]" meaning.[14] *See AADC*, 525 U.S. at 482, 119 S. Ct. 936. Rejecting the idea that § 1252(g) "covers the universe of deportation claims-that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review,'" the Supreme Court restricted § 1252(g) to three discrete actions that the Attorney General may take: the decision to "commence proceedings, adjudicate cases, or

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[13] We do not believe that either 8 U.S.C. § 1226(e) or § 1231(h) limits our jurisdiction over this appeal because these newly enacted provisions under IIRIRA do not govern this case. *See* IIRIRA § 309(c)(1).

[14] IIRIRA provides that the revised rules governing removal proceedings, as well as judicial review of those proceedings, do not apply to aliens who were already in exclusion or deportation proceedings prior to the Act's effective date on April 1, 1997. *See* IIRIRA § 309(c)(1). However, IIRIRA § 306(c)(1) makes § 1252(g) applicable to cases "arising from all past, pending, or future exclusion, deportation, or removal proceedings" under the Act. IIRIRA § 306(c)(1) (emphasis added). Section 1252(g) purports to strip courts of their jurisdiction over most actions by the Attorney General relating to immigration actions "[e]xcept as provided in this section." However, according to § 309(c)(1), none of the other provisions in § 1252 apply to cases pending before April 1, 1997. In order to avoid reading § 309(c)(1) into a nullity, the Supreme Court crafted an extremely narrow reading of § 1252(g). *See Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1020 n.3 (6th Cir. 1999) (explaining the conflict between the provisions in greater depth).

execute removal orders." *Id.* The Court noted that "[t]here are of course many other decisions or actions that may be part of the deportation process. . . ." *Id.*

In *Zhislin v. Reno*, 195 F.3d 810 (6th Cir. 1999), we applied the Supreme Court's reasoning in AADC and concluded that § 1252(g) did not preclude our review of an alien's petition for habeas corpus challenging the INS's authority to detain him indefinitely. *See Zhislin*, 195 F.3d at 814. Like *Zhislin*, Rosales does not seek to review the Attorney General's decision to commence or adjudicate a case, nor does he dispute the removal order entered against him. Instead, Rosales challenges "the right of the Attorney General to detain him indefinitely when it appears that circumstances beyond anyone's control will prevent the deportation order from ever being executed." *Id.* Such a challenge is clearly outside the purview of § 1252(g) and we may therefore consider the claim. *See Zhislin*, 195 F.3d at 814; *Carrera-Valdez v. Perryman*, 211 F.3d 1046, 1047 (7th Cir. 2000) (upholding district court's jurisdiction over Mariel Cuban's petition for release from indefinite detention); *Ho v. Greene*, 204 F.3d 1045, 1051 (10th Cir. 2000); *Ma v. Reno*, 208 F.3d 815, 818 n.3 (9th Cir. 2000), cert. granted, — U.S. —, 121 S. Ct. 297, 148 L. Ed. 2d 239 (2000); *Chi Thon Ngo v. INS*, 192 F.3d 390, 393 (3d Cir. 1999); *Zadvydas v. Underdown*, 185 F.3d 279, 285-86 (5th Cir. 1999), cert. granted, — U.S. —, 121 S. Ct. 297, 148 L. Ed. 2d 239 (2000).

III. Mootness

After this appeal was submitted to this panel, the government informed the panel that on July 19, 2000, the INS determined that Rosales is releasable under the custody review procedures of 8 C.F.R. § 212.12. In

its Notice of Releasability, the INS conditioned Rosales's release on efforts to find him a suitable sponsorship or placement, namely a halfway house, as required by the Cuban Review Plan at 8 C.F.R. § 212.12(f) ("No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee."). The Notice further stated that Rosales's release from custody is conditioned on his maintaining proper behavior while sponsorship and placement efforts are undertaken and that "[f]ailure to maintain good behavior could result in [ ] continued detention." Because the INS has not provided any further information indicating that such a sponsorship or placement has been found or that Rosales has been released on parole, we must assume that he is still in custody at the Federal Medical Center in Lexington, Kentucky.

The government argues that *Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991), stands for the proposition that the INS's notice of releasability moots Rosales's appeal. In *Picrin-Peron*, the Ninth Circuit considered a detainee's appeal from the denial of his habeas corpus petition after the detainee had been released on parole for one year. Pursuant to the court's request, an INS official authored an affidavit for the court declaring that "absent Picrin's reinvolvement with the criminal justice system, a change in the Cuban government enabling him to return to Cuba, or the willingness of a third country to accept him, he will be paroled for another year." *Picrin-Peron*, 930 F.2d at 776. Based on this sworn statement, the Ninth Circuit dismissed Picrin's petition as moot, concluding that the court could offer the detainee no further relief. *See id.*

According to Article III of the Constitution, this court only possesses jurisdiction over actual cases and controversies that will the affect the rights of the litigants. *See McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (*en banc*). A case is deemed moot if the relief sought would make no difference to the legal interests of the parties. *See id.* We are obligated to consider whether the "case or controversy" justiciability requirement has been met in this case because it must be satisfied at all stages of review, not just upon initiation of a legal action. *See id.* Rosales's petition seeks either release from custody or a hearing before the Cuban Review Panel with certain procedural protections that he believes were denied to him in error. As a preliminary step in our analysis, we note that Rosales appears to remain in federal custody, as his parole is conditioned on the INS's ability to find him a suitable halfway house as well as on his continued good behavior. We also note that, according to 8 C.F.R. § 212.12(e), "[t]he Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or any other circumstance, indicates that parole would no longer be appropriate." Should the INS decide, in its discretion, to withdraw his parole or should it be unable to find him a suitable placement, Rosales will therefore continue to be detained in federal custody. Thus, this case is not like *Picrin-Peron*, in which petitioner had already been released from detention and the INS verified in a sworn affidavit that he would continue to be granted yearly parole absent his involvement in any criminal activity. Moreover, if Rosales is not released, the same procedures that he asserts are constitutionally defective will continue to be used against him. Based on these

circumstances, we conclude that Rosales's petition for relief is not rendered moot by virtue of the fact that he has been notified that he is releasable. This case clearly represents a substantial ongoing controversy between the parties, for which this court can offer relief.

Moreover, we believe that, should Rosales be physically released, this case may also be adjudicated under the well-established exception to the mootness doctrine for controversies capable of repetition yet evading review. *See Grider v. Abramson*, 180 F.3d 739, 746 (6th Cir. 1999); *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 677 (6th Cir. 1994); aff'd, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995). Two criteria must be satisfied for a claim to fall under this exception to the mootness doctrine. First, the complaining party must show that the duration of the dispute is too short to be litigated fully prior to the cessation or expiration of the action. Second, the complaining party must show that there is a reasonable expectation that it will be subjected to the same action again. *See Suster v. Marshall*, 149 F.3d 523, 527 (6th Cir. 1998). The Cuban Review Plan confers on the Cuban Review Panel and the Associate Commissioner for Enforcement substantial discretion to withdraw parole approval prior to release and to revoke a detainee's parole once he is out of custody. *See* 8 C.F.R. § 212.12(e), (h).[15] While the Plan provides yearly review

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[15] The Associate Commissioner may revoke parole in the exercise of her discretion when "(1) The purposes of parole have been served; (2) The Mariel Cuban violates any condition of parole; (3). It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or (4) The period of parole has expired without being renewed." 8 C.F.R. § 212.12(h).

for detainees who have been refused parole, *see id.* at § 212.12(g)(2), the Cuban Review Plan Director may schedule a review of the detainee's status "at any time when the Director deems such a review to be warranted." *See id.* at § 212.12(g)(3). Due to the discretionary nature of these regulations, the Associate Commissioner for Enforcement or the Cuban Review Panel may grant parole, withdraw parole approval or revoke Rosales's parole repeatedly within a time period too short to effect appellate review of a habeas corpus petition. We have every reason to believe that future review of another habeas petition filed by Rosales will take at least as long as the instant case in arriving at this court. Moreover, should the INS and its officials engage in repeated denials, revocations or withdrawals of parole, the regulations make clear that Rosales will face the same detention and hearing procedures that he challenges in his current petition. Because Rosales's situation is capable of repetition yet evading review, we conclude that his appeal is not moot.

IV. Standard of Review

This court reviews a district court's dismissal of a habeas corpus petition de novo. *See Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998).

V. Analysis

This circuit has not ruled definitely on the constitutionality of indefinite detention of excludable aliens.[16]

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[16] This court has authored several unpublished decisions including *Betancourt v. Chandler*, No. 99-5797, 2000 WL 1359634, at *2 (6th Cir. Sept. 14, 2000) (rejecting claim that Attorney General lacks authority to detain excludable alien indefinitely); *Laetividad v. INS*, No. 99-5245, 1999 WL 1282432, at *1 (6th Cir. Dec. 27, 1999); *Fernandez-Santana v. Chandler*, No. 98-6453, 1999 WL

In its brief to this court, the government frames the question before us as whether Rosales has a protected statutory or constitutional entitlement to immigration parole. The larger question, however, is whether the executive branch of the government has the authority under the United States Constitution to detain a person indefinitely without charging him with a crime or affording him a trial. We hold that indefinite detention of Mario Rosales-Garcia cannot be justified by reference to the government's plenary power over immigration matters and that it violates Rosales's substantive due process rights under the Due Process Clause of the Fifth Amendment to the Constitution.

A. Statutory Authority to Detain Indefinitely

Our first point of analysis is Rosales's statutory claim that the Attorney General and the INS violated their governing statutes and regulations by denying him parole and detaining him indefinitely. *See Reno v. Flores*, 507 U.S. 292, 300, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (noting reviewing court's obligation to construe statutes to avoid constitutional problems unless such construction is plainly contrary to Congress's intent). The government argues that we are bound by former 8 U.S.C. § 1226(e) (1994), which, according to the government, authorizes the Attorney General to continue to detain Rosales indefinitely. According to IIRIRA,

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1281781, at *1 (6th Cir. Dec. 27, 1999); and *Gonzalez v. Luttrell*, No. 96-5098, 1996 WL 627717, at *1 (6th Cir. Oct. 29, 1996), that affirm the district court's dismissal or denial of an excludable alien's habeas corpus petition. However, because these cases are unpublished, they are not binding on this court. *See* 6th Cir. R. 28(g); *Salamalekis v. Comm'r of Soc. Sec.*, 221 F.3d 828, 833 (6th Cir. 2000) (unpublished decisions are not binding precedent).

its permanent provisions apply only to removal proceedings commenced after April 1, 1997, IIRIRA's effective date. *See* IIRIRA § 309(c)(1). We agree with the government that we must apply former § 1226(e) to the instant case because Rosales was declared excludable in 1987 and his immigration parole was last revoked on March 24, 1997, prior to the Act's effective date.[17] *Cf. INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999) (counseling that courts of appeals must apply Chevron deference to agency's interpretations of immigration statute).

According to former § 1226(e), pending a determination of excludability, the Attorney General must take into custody any alien convicted of an aggravated felony[18] upon release of the alien. *See* § 1226(e)(1) (1994); *see also* 8 U.S.C. § 1182(d)(5)(A) (1994) (giving the Attorney General the right to return into custody an excludable alien when "the purposes of such parole shall . . . have been served"); § 1227(a) (1994) (authorizing Attorney General immediately to deport any alien who is excludable unless she decides, in her discretion, "that immediate deportation is not practicable or proper"). Under the former statute, the Attorney General may not release the alien from custody unless she determines that the alien may not be deported because the alien's home country denies or unduly delays acceptance of the alien's return. *See* § 1226(e)(2) (incorporating 8 U.S.C. § 1253(g) (1994)). If this deter-

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[17] 8 U.S.C. § 1226 (1994) was repealed and reenacted by Congress in IIRIRA § 303 (codified at 8 U.S.C. § 1226). The amended version of the statute is inapplicable to this case.

[18] See 8 U.S.C. § 1101(a)(43) (1994) (defining aggravated felonies).

mination is made, the Attorney General may release the alien only after a review in which the severity of the felony committed by the alien is considered and the review concludes that the alien will not pose a danger to the safety of other persons or to property. *See* § 1226(e)(3). Many circuits, including the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have found former § 1226(e) to authorize the Attorney General to detain indefinitely an excludable alien who has been convicted of an aggravated offense. *See Ho v. Greene*, 204 F.3d 1045, 1055 (10th Cir. 2000) (Attorney General has authority to continue indefinitely to detain excludable alien whose deportation cannot be accomplished expeditiously because the "statute is framed not as a grant of authority to detain the alien, but as a limitation on the Attorney General's power to release the alien from detention"); *Carrera-Valdez v. Perryman*, 211 F.3d 1046, 1048 (7th Cir. 2000); *Chi Thon Ngo v. INS*, 192 F.3d 390, 394 (3d Cir. 1999) (statute permits prolonged detention of excludable aggravated felons); *Gisbert v. U.S. Attorney Gen.*, 988 F.2d 1437, 1446 (5th Cir 1993) ("[W]e do not regard section 1226(e) as a limitation on the Attorney General's authority to detain excludable aliens, either before or after final determination of excludability, pending their removal from this country."); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991) ("The only logical interpretation of section 1226(e) is that it . . . provides that where deportation of an alien found excludable cannot be immediate, the Attorney General may release [the alien] only if doing so will not endanger society.").

Former § 1226(e) is not ambiguous concerning the Attorney General's discretion to detain indefinitely an excludable alien whose deportation cannot be exped-

itiously accomplished. The statute explicitly states that the Attorney General "shall" not release an alien from custody unless she determines that the alien will not pose a danger to the safety of other persons or to property. The statute does not contain any language limiting the length of time the Attorney General may detain an alien pending a determination that the alien no longer poses a threat to society. Nor does the statute carve an exception to this language for aliens whose home countries refuse to accept their return. We therefore conclude, in accordance with the other circuits that have analyzed this issue, that the statute clearly authorizes the Attorney General to detain an excludable alien indefinitely. Because we cannot construe the statute to avoid constitutional inquiry, we must now address the constitutionality of Rosales's detention.

B. The Immigration Statute and the Plenary Power Doctrine

In this case, we are confronted with two principles deeply embedded in our jurisprudence that conflict with each other: the political branches' almost complete authority over immigration matters and a person's inalienable right to liberty absent charges or conviction of a crime. Rosales's petition for habeas corpus relief does not contest the government's almost complete control over matters of immigration policy. Under Art. I, § 8, cl. 4 of the Constitution[19] and the plenary power

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[19] The Constitution imbues the legislature with the power to "establish an uniform Rule of Naturalization." U.S. CONST. Art. I, § 8, cl. 4.

doctrine,[20] the executive and legislative branches have coordinate authority to establish and enforce policies for admission to and exclusion from this country, while the judiciary accords those branches almost total deference. *See Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976) ("[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S. Ct. 309, 94 L.Ed. 317 (1950) (authority over immigration matters stems not just from legislative power "but is inherent in the executive power to control the foreign affairs of the nation."); *Fong Yue Ting v. United States*, 149 U.S. 698, 711, 13 S. Ct. 1016, 37 L.Ed. 905 (1893) (it is the "right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare. . . ."). Under this doctrine, the Attorney General is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, and she does so with virtually

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[20] The plenary power doctrine, articulated in *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S. Ct. 512, 96 L.Ed. 586 (1952), states that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *See also Zadvydas*, 185 F.3d at 289 ("The power of the national government to act in the immigration sphere is thus essentially plenary.").

no interference from the courts.[21] The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L.Ed. 956 (1953); *see also Diaz*, 426 U.S. at 82, 96 S. Ct. 1883 (noting "narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

Nor does Rosales contest the government's right to designate him an excludable alien and attempt to remove him from this country. The principle that there is no constitutional right to enter this country, *see Knauff*, 338 U.S. at 542, 70 S. Ct. 309, is not under review in this case. The Supreme Court has made clear that an attempt to enter this country is considered a request for a privilege rather than an assertion of right, because "the power to admit or exclude aliens is a sovereign prerogative." *See Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982). According to the Supreme Court, such a privilege can only be exercised according to the procedures established by Congress and implemented by the appropriate executive officials. *See Knauff*, 338 U.S. at 542-44, 70 S. Ct. 309.

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[21] *See* 8 U.S.C. §§ 1103, 1182. Section 1103(a)(1) states that the "Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens" and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."

Finally, Rosales does not challenge the government's application of the "entry fiction" to his case. Under the former version of the immigration act the government had two mechanisms for returning non-citizens to their country of origin: "exclusion" was the procedure used to refuse an alien entry at the border of this country; "deportation" was the procedure used to remove an alien who has already entered the country but is here illegally. *See Plasencia*, 459 U.S. at 25-26, 103 S. Ct. 321. Although exclusion proceedings usually occurred at the port of entry, the Supreme Court developed what has become known as the "entry fiction" to govern the rights of those aliens who are deemed excludable but who have nonetheless been allowed to enter physically the United States for humanitarian, administrative, or other reasons, under 8 U.S.C. § 1182(d)(5)(A). Under the entry fiction, an alien deemed to have entered this country illegally is treated as if detained or "excluded" at the border despite his physical presence in the United States. *See Gisbert*, 988 F.2d at 1440 (explaining distinction between excludable and deportable aliens). Excludable aliens have no rights with regard to their entry or exclusion from this country and they are treated differently from those who have "passed through our gates." *Mezei*, 345 U.S. at 212, 73 S. Ct. 625; *but see Plasencia*, 459 U.S. at 32-34, 103 S. Ct. 321 (resident alien detained at border upon return to country is validly subject to exclusion proceeding but may invoke procedural due process protections during proceedings); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-600, 73 S. Ct. 472, 97 L.Ed. 576 (1953) (resident alien returning to U.S. after five-month absence is subject to exclusion hearing but is entitled to procedural due process protections). According to the Supreme Court, they are due only the procedures

authorized by Congress for their removal proceedings and nothing more. *See Mezei*, 345 U.S. at 212, 73 S. Ct. 625 (citing *Knauff*, 338 U.S. at 544, 70 S. Ct. 309); compare *Zadvydas*, 185 F.3d at 295-97 (extending entry fiction to deportable aliens who have received final order of deportation and stripping them of due process right to be free from indefinite detention) *and Ho*, 204 F.3d at 1059-60 (same) *with Ma*, 208 F.3d at 825-26 n.23 (rejecting INS's argument that aliens ordered deportable are on same constitutional footing as excludable aliens seeking entry).

Rosales does, however, challenge the government's authority to detain him indefinitely after he has completed his federal prison sentence and has neither been charged with nor convicted of another crime. It is to this challenge that we now turn our attention.

C. Constitutional Authority to Detain Indefinitely

The Fifth Amendment to the Constitution restricts the government from depriving all persons of the right to life, liberty, or property without due process of law. See U.S. CONST. amend. V. The Supreme Court has consistently held that aliens physically present in this country are not wholly without constitutional protection. Indeed, the Supreme Court has accorded aliens a panoply of Fifth, Sixth, and Fourteenth Amendment rights. Should an excludable alien be accused of committing a crime, he would be entitled to the constitutional protections of the Fifth and Sixth Amendments. *See Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L.Ed. 140 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments, and that even

aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). Thus, in *Wong Wing v. United States*, the Court struck down a federal statute imposing a maximum of one year of hard labor on a Chinese alien upon a determination of his deportability, finding it a violation of the alien's due process right to be free from punishment without trial. In *Yick Wo v. Hopkins*, another early immigration case, the Supreme Court announced that the Fourteenth Amendment's protections extend to aliens as well:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L.Ed. 220 (1886) (finding imprisonment of Chinese immigrants under state statute unconstitutional because it violated Equal Protection Clause of Fourteenth Amendment); *see also Flores*, 507 U.S. at 315-16, 113 S. Ct. 1439 (O'Connor, J., concurring) (emphasizing that juvenile aliens have a constitutionally protected liberty interest, rooted in the Due Process Clause, in freedom from institutional confinement); *Diaz*, 426 U.S. at 77, 96 S. Ct. 1883 (noting that there are millions of aliens in this country and that "[t]he Fifth Amendment, as well

as the Fourteenth Amendment, protects every one of these [aliens] from deprivation of life, liberty, or property without due process of law" whether they are here unlawfully or not).

As the Supreme Court has evaluated whether to extend entitlements or rights to aliens in addition to those protected by the Fifth, Sixth, and Fourteenth Amendments, the Court has demonstrated a willingness to draw lines between the rights due to citizens and those due to aliens. *See Diaz*, 426 U.S. at 80, 96 S. Ct. 1883 (noting that "Congress regularly makes rules that would be unacceptable if applied to citizens"). The Court has also expressed its willingness to distinguish among different classifications of aliens. However, it has never held that aliens are utterly beyond the purview of the Constitution. Thus, in Diaz, the Court held that Congress may constitutionally condition an alien's receipt of federal medical insurance benefits (Medicare Part B) on the legality of his entry and the length of his residence in this country. *See Diaz*, 426 U.S. at 82-83, 96 S. Ct. 1883. However, in *Graham v. Richardson*, 403 U.S. 365, 374, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), the Court held that state statutes conditioning welfare benefits on a residency requirement or denying welfare benefits to resident aliens violated the Fourteenth Amendment's Equal Protection Clause. The Supreme Court has also determined that the exclusion of the children of illegal aliens from a public school system pursuant to a state statute violated the Equal Protection Clause of the Fourteenth Amendment. Rejecting the government's argument that illegal aliens are not "persons" within the purview of the Constitution, the Court stated that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens

whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

The government, relying on the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953), asks this court to conclude, despite a long line of Supreme Court decisions extending to aliens basic Fifth, Sixth, and Fourteenth Amendment protections, that excludable aliens have no cognizable Fifth Amendment liberty interest under the Constitution in freedom from indefinite incarceration. In *Mezei*, the Supreme Court reviewed the case of an excludable alien who was being detained indefinitely on Ellis Island because this country deemed him a security threat and the alien's home country, as well as other nations, refused to allow him to return.[22] When the case reached the Supreme Court in 1953, Mezei had been detained on Ellis Island for close to two years. Addressing the question whether the potentially indefinite detention of an excludable alien without a hearing violated the Constitution, the Supreme Court observed that "[c]ourts have long recognized the power to expel or exclude aliens as

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[22] Mezei was born in Gibraltar and lived in the United States from 1923 to 1948. *See Mezei*, 345 U.S. at 208, 73 S. Ct. 625. In 1948, he went to Romania to visit his dying mother. He was denied entry to Romania, and remained in Hungary for 19 months before returning to the United States with a quota immigration visa issued by this country. On February 9, 1950 he was deemed excludable by an immigration officer at Ellis Island on the ground that his entry would prejudice the public interest because he was a security threat.

a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Mezei*, 345 U.S. at 210, 73 S. Ct. 625. The Court then deferred to the executive's authority to "impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife." *Id.* Noting the existence of a presidentially-declared state of emergency, the Supreme Court found that the Attorney General's authority to act derived from the Passport Act of 1918, which permitted the executive to "shut out aliens whose 'entry would be prejudicial to the interest of the United States'" during periods of national emergency.[23] *Id.* at 210-11, 73 S. Ct. 625 (citing regulations at 8 C.F.R. § 175.53 promulgated in accordance with the amendments to the Passport Act). The Supreme Court decided that "the times being what they are" it would not question the Attorney General's discretion to detain Mezei at Ellis Island in deference to his assessment that Mezei presented a security threat. *Id.* at 216, 73 S. Ct. 625. Deeming this case "[a]n exclusion proceeding grounded on danger to the national security," *id.*, the Court refused to substitute its judgment for the legislative will. Thus, it found no statutory or constitutional impediment to Mezei's detention or denial of a hearing. *See id.* at 215, 73 S. Ct. 625.

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[23] The Passport Act was amended in 1941 by an act of Congress pursuant to a national emergency declared by the President on May 27, 1941 and which continued in effect in 1953. The amendments to the Act gave the Attorney General authority to exclude aliens whose "entry would be prejudicial to the United States." *See Knauff*, 338 U.S. at 540-41, 70 S. Ct. 309 (citing Act of June 21, 1941, c. 210, 55 Stat. 252, amending § 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, codified at 22 U.S.C. § 223 (repealed 1952)).

The government would have this court accept the premise that the entry fiction completely forecloses any need for this court to examine whether an excludable alien, faced with the prospect of indefinite detention imposed by an executive agency, possesses a Fifth Amendment interest in liberty from physical constraint. We do not disagree that the entry fiction is an important doctrinal principle that the Supreme Court has employed to uphold this country's immigration laws and regulations, most notably our sovereign right to determine who may enter our borders, and our concomitant policy not to let other nations determine whom we must accept or reject by virtue of their refusal to repatriate their own citizens. However, crucial to our understanding and application of the Mezei decision are the circumstances in which the case was decided: the opinion was authored in the midst of the Korean War, as our nation labored under a fear of Communist infiltration[24] and in a state of affairs defined as a national emergency.[25] Courts have always allowed

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[24] The Supreme Court in *Mezei* specifically noted that Mezei's stateless condition was due to the fact that he "left the United States and remained behind the Iron Curtain for 19 months." *Mezei*, 345 U.S. at 214, 73 S. Ct. 625. In his dissent, Justice Jackson criticized the majority for succumbing to the government's fear of Communist "infiltration." He stated: "[M]y apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else." *Id.* at 227, 73 S. Ct. 625 (Jackson, J., dissenting). He concluded by observing that it is "inconceivable" that a "measure of simple justice and fair dealing," namely a "fair hearing with fair notice of the charges," would "menace the security of this country. No one can make me believe that we are that far gone." *Id.* at 228, 73 S. Ct. 625.

[25] Moreover, *Mezei* has been severely criticized for establishing a "preposterous" level of deference to Congress's authorization of

the executive an extraordinary amount of leniency during wartime or when the national security is truly at stake.[26] Such incomparable exigencies are clearly not present in the instant case. We are not operating in a declared state of emergency nor has there been any suggestion to this court that Rosales poses a threat to our national security.

Moreover, while the government argues for absolute judicial deference to its plenary power over immigration policies, it is clear to this court that Congress may not authorize immigration officials to treat excludable aliens with complete impunity. For example, the INS may not, consistent with the Constitution, execute an excludable alien should it be unable to effect his prompt deportation. It is also evident that Congress cannot authorize the infliction of physical torture

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due process procedures for aliens. *See* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1392 (1953).

[26] Indeed, prior to those Supreme Court cases in the 1950s allowing indefinite detention, courts refused to permit the indefinite detention of aliens. As one court held:

> The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime. . . . [Petitioner] is entitled to be deported, or to have his freedom.

Bonder v. Johnson, 5 F.2d 238, 239 (D. Mass. 1925); see also *Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (holding that government must release alien if government fails to execute order of deportation "within a reasonable time").

upon an excludable alien while he is detained in federal prison. See *Gisbert*, 988 F.2d at 1442; *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (excludable aliens "are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials"). Consequently, we emphatically reject the government's premise that excludable aliens are completely foreign to the Fifth Amendment of the Constitution.[27] We therefore find ourselves asked to draw a line of constitutional dimension between the act of torturing an excludable alien and the act of imprisoning such an alien indefinitely. We do not believe that the Constitution authorizes us to draw such a line. While it is true that aliens are not entitled to enjoy all the advantages of citizenship, see *Diaz*, 426 U.S. at 78, 96 S. Ct. 1883, we emphasize that aliens—even excludable aliens—are "persons" entitled to the Constitution's most basic protections and strictures. We conclude that if Rosales is indeed being detained indefinitely, discussed infra, his Fifth Amendment interest in liberty is necessarily implicated.

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[27] Other circuits have noted that excludable aliens possess some form of due process rights. *See, e.g., Chi Thon Ngo*, 192 F.3d at 396 ("Even an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process."); *Zadvydas*, 185 F.3d at 294 ("Excludable aliens are persons, entitled to some due process, and other, constitutional protections."); *Lynch*, 810 F.2d at 1366 (holding that "even excludable aliens are entitled to the protection of the due process clause while they are physically in the United States").

D. Rosales's Fifth Amendment Right to Liberty

The right to be free from bodily restraint, the right at issue in this case, is not a new liberty interest, but is at the heart of those interests protected by the Due Process Clause of the Fifth Amendment and available to all persons within our shores.[28] Rosales asserts that his continuing confinement without trial violates his substantive due process rights under the Fifth Amendment to the Constitution. He also argues that his procedural due process rights have been violated because he was not afforded certain procedural protections during his parole revocation hearing with the Cuban Review Panel. In response, the government urges that "it is undisputed that an alien who has been denied admission to the United States has no liberty interest that would entitle him to be at-large within our borders even temporarily." Appellee's Br. at 25. According to the government, once an alien has been found excludable his detention is a mere continuation of the exclusion that has been authorized by Congress. Because detention serves only to effectuate the exclusion order, there can be no limit on its length, other than a statutory limit, which Congress has not chosen to provide. *See* 8 U.S.C. § 1226(e) (1994).

The Due Process Clause is comprised of two components, one substantive and the other procedural. Substantive due process precludes "the government

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[28] We note that the Supreme Court decided *Mezei* before deciding a line of cases that expanded upon its conceptions of substantive due process, as well as cases that developed a framework for analyzing whether civil or regulatory confinement rises to the level of criminal "punishment" and thus violates a detainee's substantive due process rights.

from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *See United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (citing *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). Indeed, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

We construe Rosales's petition for habeas corpus relief to challenge his detention as impermissible punishment in the absence of a trial. The deprivation of a fundamental liberty interest comports with due process only if it is narrowly tailored to serve a compelling government interest. *See Flores*, 507 U.S. at 302, 113 S. Ct. 1439. According to *Salerno*, in order to determine whether Rosales's detention constitutes an impermissible restriction on liberty or permissible regulation, this court must analyze whether the detention is imposed for the purpose of punishment or whether it may be considered merely incidental to another legitimate government purpose. *See Salerno*, 481 U.S. at 747, 107 S. Ct. 2095. Unless Congress expressly provides that the purpose of the legislation is punitive, this court must determine whether there is an alternative purpose for the restriction. *See id.* Because the Supreme Court has found that deportation proceedings for resident aliens are civil actions that are not intended as punishment for unlawful entry into this country, we must conclude, for the purposes of this case, that Congress did not intend to punish excludable aliens by

detaining them prior to removal from this country. *See AADC*, 525 U.S. at 491, 119 S. Ct. 936 ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."). If the detention is intended as legitimate regulation, as in this case, we must then determine (1) whether there is an alternative, non-punitive purpose which may rationally be assigned to the detention, and (2) whether the detention "appears excessive in relation to the alternative purpose assigned [to it]." *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095 (internal citation omitted).

Bound by this analytical framework, we first consider whether the government has articulated an alternative purpose, other than punishment, that is rationally related to Rosales's detention. The government has identified its interests in detaining Rosales as the need to protect society from a person who poses a danger to the safety of other persons or to property pursuant to 8 U.S.C. § 1226(e) (1994).[29] As we note infra, we do not dispute that Rosales's detention is rationally related to this alternative purpose. Our analysis focuses on the

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[29] Other courts have identified additional purposes for detention including: the government's ability to enforce deportation or exclusion orders; and preventing an alien's flight prior to deportation. *See Hermanowski v. Farquharson*, 39 F. Supp. 2d 148, 159 (D.R.I. 1999); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1155-56 (W.D. Wash. 1999); *Vo v. Greene*, 63 F. Supp. 2d 1278, 1285 (D. Colo. 1999). However, because the government identified only safety to persons and property as its rationale for Rosales's detention, we confine ourselves to evaluating this interest.

second prong of the *Salerno* test: evaluating whether Rosales's detention appears excessive in relation to the alternative purpose such that it violates his Fifth Amendment interest in liberty. In order to evaluate the question of excessiveness, we must balance the government's stated purpose against the likelihood of Rosales's deportation.

The Due Process Clause clearly does not grant a person an absolute right to be free from detention, even when convicted of no crime. *See Salerno*, 481 U.S. at 748, 107 S. Ct. 2095; *see also Schall v. Martin*, 467 U.S. 253, 281, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984) (permitting pretrial detention of juvenile delinquents considered dangerous); *Bell v. Wolfish*, 441 U.S. 520, 535-40, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (allowing pretrial detention of arrestee if court finds there is risk of flight); *Carlson v. Landon*, 342 U.S. 524, 537-42, 72 S. Ct. 525, 96 L. Ed. 547 (1952) (allowing detention of Communist aliens pending deportation because they posed threat to nation's public interest). In *Salerno*, the Supreme Court upheld the Bail Reform Act against a challenge asserting that pretrial detention of prisoners amounted to a deprivation of the prisoners' liberty in violation of the Fifth Amendment. Noting that Congress's stated goal in enacting the Bail Reform Act was to protect the community from dangerous persons likely to commit crime prior to trial, the Court held that "preventing danger to the community is a legitimate regulatory goal" and the Act was rationally related to that goal. *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095; *see also Martin*, 467 U.S. at 264, 104 S. Ct. 2403 ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."). However, the Court explicitly acknowledged that

length of detention could contribute to a finding of excessiveness when it observed that, at some point, "detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *See Salerno*, 481 U.S. at 747 n. 4, 107 S. Ct. 2095. In its conclusion that the Bail Reform Act did not cross that point, the Court emphasized that the Act "limits the circumstances under which detention may be sought to the most serious of crimes." *Id.* at 747, 107 S. Ct. 2095. Among the factors contributing to its conclusion, the Court noted that the government must demonstrate probable cause that the arrestee committed the charged crime; the government must prove by clear and convincing evidence that the arrestee presents an identified and articulable threat to an individual or the community; the arrestee is entitled to a prompt detention hearing at which he may be represented by counsel and has the right to testify, present evidence and cross-examine witnesses; and the Speedy Trial Act strictly limits the amount of time an arrestee may be detained prior to trial. *See id.* at 747-51, 107 S. Ct. 2095. Thus, the *Salerno* Court, carefully delineating the contours of permissible detention, held that a finding of dangerousness alone is not enough to justify civil pretrial detention without assurances that the detention is of finite and limited duration.

Just as the Supreme Court concluded in *Salerno*, we recognize that Rosales's detention is rationally related to the government's non-punitive purpose of protecting public safety. Our concern is whether Rosales's detention, rationally related though it may be to the government's purpose, is unconstitutionally excessive when compared with the indefinite nature of his confinement. Detention to effectuate deportation is

arguably analogous to detention prior to criminal trial. Although Rosales has never committed a crime of violence, he has compiled a fairly long and progressively more serious criminal record. The government's interest in detaining Rosales to protect the community from harm is perhaps similar to the government's interest in detaining a violent arrestee prior to trial who presents a safety risk to the community should he be released. As the Supreme Court held in *Salerno*, "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 481 U.S. at 748, 107 S. Ct. 2095. However, in this case, there are no protections similar to those in *Salerno* for aliens who are detained while the government attempts to effect their deportation. *Cf. Foucha*, 504 U.S. at 82, 112 S. Ct. 1780 (indefinite civil commitment of mentally ill persons is unconstitutional because, unlike in *Salerno*, the detention is not limited in duration); *Martin*, 467 U.S. at 269-70, 104 S. Ct. 2403 (pretrial detention of juveniles is constitutional because it is "strictly limited in time" and juveniles receive an array of procedural protections during detention such that juvenile may not be detained more than seventeen days). As the government has repeatedly emphasized, there are no limits on the length that the Attorney General may, under 8 U.S.C. § 1226(e) (1994), detain an excludable alien released from prison once the Attorney General concludes that the alien presents a danger to persons or property.

Moreover, we note that in this case, unlike in *Salerno*, Rosales has served his prison sentence for the crime with which he was charged and to which he pleaded guilty. The district court judge set the length of Rosales's sentence pursuant to the United States

Sentencing Guidelines, and Rosales paid his debt to society in due course. Should Rosales commit another crime upon his release, there is no reason why he could not be charged, prosecuted, and convicted for that crime. His sentence would undoubtedly reflect his recidivist tendency. *Cf. Foucha*, 504 U.S. at 82, 112 S. Ct. 1780 (noting that society's "normal means of dealing with persistent criminal conduct" is sufficient arsenal against threat that mentally ill person may commit future crime if he is not indefinitely committed). Were Rosales a citizen, he would be entitled to be free once he served his sentence absent any new charges of criminal conduct, even if authorities believed him still to be a dangerous person capable of inflicting future harm on society.

Because Congress has bestowed on the executive the authority to determine whether an alien released from prison still presents a threat to society, however, such an alien may be detained after serving his sentence and prior to his deportation. This court does not dispute Congress's authority to grant the executive that power. However, we note that in one of its earliest immigration cases, the Supreme Court delineated between detention as a means to ensure deportation and detention as a method of punishment. In *Wong Wing*, the Supreme Court stated that "[w]e think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid." *Wong Wing*, 163 U.S. at 235, 16 S. Ct. 977. Implicit in the Supreme Court's opinion is the idea that the strength of the government's interest in protecting the community and enforcing its immigration laws must be considered in relation to the possibility that the government may

actually achieve its goal to effect Rosales's deportation. With this admonition in mind, we turn to an evaluation of the likelihood of Rosales's return to Cuba in order to determine whether his civil detention is excessive in relation to the government's purpose in detaining him.

The government argues that Cuba's unwillingness to accept the return of its citizens does not affect Rosales's statutory or constitutional rights. Appellee's Br. at 18. We disagree. The government submitted an affidavit by Michael Ranneberger, the Coordinator of the Office of Cuban Affairs in the State Department, detailing this country's negotiations with Cuba for the return of Mariel Cubans. Ranneberger's testimony reveals clearly that little progress on repatriation has been made in over fifteen years of talks. Ranneberger could only assert that the issue of repatriating Mariel Cubans "remains under discussion." J.A. at 57. No evidence was presented to this court that any agreement between the two nations was likely or even possible in the near future. Moreover, no evidence was presented that Rosales is among those Mariel Cubans who may be returned even if such an agreement were to be executed.

Because the government has offered this court no credible proof that there is any possibility that Cuba may accept Rosales's return any time in the foreseeable future, we are constrained to conclude that Rosales faces indefinite detention.[30] While other circuits have found that excludable aliens cannot demonstrate that they are being detained indefinitely because of the possibility that their home country will one day invite

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[30] Rosales has thus far been detained in immigration custody for over three years.

them back, *see Zadvydas*, 185 F.3d at 294 (holding that detention is not indefinite until there is a showing that "deportation is impossible, not merely problematical, difficult, and distant"); *Chi Thon Ngo*, 192 F.3d at 398 (concluding that "[i]t is extremely unlikely that the [Vietnamese] petitioner's detention will be permanent" because "[d]iplomatic efforts with Vietnam are underway, albeit at a speed approximating the flow of cold molasses"), we decline to impose such a standard on Rosales. We will not require an alien to demonstrate that there is no conceivable possibility that his home country will ever accept his return in order to prove that his or her detention is indefinite in nature. Due to the vicissitudes of national politics and the potential for change in international relations, no alien could ever surmount such a standard, as the government need only point to ongoing talks, as it has in this case, or the potential for renewed relations to defeat the alien's claim that his home nation has no interest in repatriating him. Instead, this court will require the government to demonstrate (1) that the alien's home nation and this government are engaged in diplomatic discussions which encompass a specific repatriation agreement whose details are currently being negotiated; and (2) that the alien is among those whose repatriation the agreement contemplates. We believe that, because the government has superior access to information on our diplomatic negotiations with other nations, the burden appropriately rests on the government to demonstrate adequately to this court that there is a genuine likelihood that the alien is among those whom the home country will agree to take back.[31]

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[31] Although the dissent states that excludable aliens "*will not* or cannot go elsewhere," *see infra* p. [120a] (emphasis added), we

Moreover, we conclude that the fact that Rosales receives periodic review of his parole status does not affect the nature of his detention as indefinite. The district court determined that because the Cuban Review Plan calls for yearly consideration of a detainee's status, Rosales cannot characterize his detention as indefinite. J.A. at 92. According to the district court, "[h]is detention is not indefinite but is for only one year at a time; at the end of each year he has an opportunity to plead his case anew." J.A. at 92. Other courts have held similarly. *See Chi Thon Ngo*, 192 F.3d at 398 (finding prolonged detention permissible provided the appropriate provisions for parole are available); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc) (Mariel Cuban's detention is more like "a series of one-year periods of detention followed by an opportunity to plead his case anew"); *cf. Zadvydas*, 185 F.3d at 291 (noting that because a resident alien has the opportunity to be paroled by showing that he is no longer either a threat to the community or a flight risk, and because his case is reviewed periodically, his detention cannot be considered indefinite). However, as Rosales noted himself in his *pro se* brief to this court, even monthly review of his status would not change the fact that he will not be

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think it important to note that it has never been suggested to this court that Rosales has had the opportunity to be released to any third country. The dissent further states, *see infra* note 17, that "Rosales's habeas petition does not suggest that he or his relatives, who are living in Florida, have arranged for him to leave the United States. Instead, he wants to be released into this country." We seriously question how an alien who is in prison and unrepresented by counsel could ever "arrange" to leave this country, much less whether there is any evidence in the record that any other country will accept Rosales.

released until Cuba agrees to accept him, a prospect we have already discounted, or the Cuban Review Panel determines that his behavior comports with its guidelines such that it may offer him parole. As we discussed earlier, because of the broad discretion bestowed upon the INS to grant and revoke parole, Rosales can never be certain of receiving such parole, no matter how well he behaves himself in detention.

Bearing in mind our obligation to weigh the government's stated interest in protecting the community from danger against the likelihood that the government will be able to effectuate Rosales's deportation, we conclude that Rosales's confinement can only be considered excessive in relation to the purpose of protecting the community from danger and enforcing an immigration order that is, at present, unenforceable.[32] We believe that this case no longer implicates the government's plenary power to control the scope of our nation's immigration laws, namely its ability to enforce final orders of exclusion and deportation. Judicial deference to the political branches' authority over immi-

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[32] Several district courts have reached the same constitutional conclusion with regard to deportable aliens. *See Kay v. Reno*, 94 F. Supp. 2d 546, 553 (M.D. Pa. 2000); *Le v. Greene*, 84 F. Supp. 2d 1168, 1175 (D. Colo. 2000); *Vo* v. *Greene*, 63 F. Supp. 2d 1278, 1285 (D. Colo. 1999); *Tam v. INS*, 14 F. Supp. 2d 1184, 1192 (E.D. Cal. 1998) ("At some point, indefinite detention of a deportable alien caused by an unenforceable INS order must intersect with the Constitution"); *Hermanowski v. Farquharson*, 39 F. Supp. 2d 148, 162 (D.R.I. 1999) (detention for over twenty-eight months with the promise of continued imprisonment for the rest of his life even though alien's country has refused to allow deportation constitutes governmental conduct that "shocks the conscience" in violation of the Fifth Amendment).

gration matters has always been premised on the paramount importance of our nation's self-determination and our national prerogative to control who enters our borders and on what conditions. *See Aguirre-Aguirre*, 526 U.S. at 425, 119 S. Ct. 1439 (noting that judicial deference "is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations") (internal citation omitted). Such deference becomes less compelling, however, when it directly conflicts with other constitutional interests. *Cf. INS v. Chadha*, 462 U.S. 919, 941, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.") (internal citation omitted). When there is no practical possibility that the alien will be returned home, as in this case, then Rosales's prolonged detention can no longer be considered an ancillary administrative element of the INS's removal procedures and judicial deference loses its rationale altogether. We agree with the Tenth Circuit that when an alien's home country refuses to accept him, it appears that "detention is [ ] used as an alternative to exclusion rather than a step in the process of returning petitioner to his native Cuba."[33]

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[33] Although the dissent claims that our reasoning will undermine this nation's ability to enforce its immigration laws by encouraging foreign countries to send their undesirable citizens to our shores, see infra p. [132a-133a], we believe the dissent's contention is belied by common sense. By virtue of the fact that a nation has cast out certain of its citizens—as in the Mariel boatlift—we can reasonably conclude that such a nation is unlikely to be influenced by the possibility that one day its citizens might be

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1386 (10th Cir. 1981); *cf. Chi Thon Ngo*, 192 F.3d at 398 ("It is [ ] unrealistic to believe that these INS detainees are not actually being 'punished' in some sense for their past conduct."). We conclude, therefore, that Rosales's detention has crossed the line from permissive regulatory confinement to impermissible punishment without trial.[34] We order Rosales's release within thirty days of the issuance of the mandate, following a hearing before the district court, upon such conditions as the district court may impose consistent with this opinion.

VI. Conclusion

The district court held that the prospect of indefinitely detaining Rosales was not "arbitrary, conscience-shocking nor oppressive in the constitutional sense." With all due respect, this court must disagree. We conclude that the district court improperly denied Rosales's petition for habeas corpus. We therefore **REVERSE** the district court's judgment and **REMAND** for proceedings in accordance with this opinion.

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paroled into this country, rather than spending their remaining days locked up in American detention centers.

[34] Because we find that petitioner's substantive due process rights were violated, we do not reach his procedural due process claims.

RICE, District Judge, dissenting.

Petitioner Mario Rosales-Garcia ("Rosales"), a citizen of Cuba, is an excludable alien who came to the United States as part of the Mariel boatlift. Since his arrival, Rosales twice has been granted immigration parole by the Immigration and Naturalization Service ("INS")[1] On each occasion, the INS revoked his parole after his conviction on various criminal charges. He is now being detained by the INS, pending an agency determination either (1) that he is eligible for immigration parole once again or (2) that Cuba will accept his return. The majority frames the issue before the court as "whether the executive branch of the government has the authority under the United States Constitution to detain a person indefinitely without charging him with a crime or affording him a trial." With respect to Rosales, the majority answers this question in the negative, concluding that his indefinite detention "cannot be justified by reference to the government's plenary power over immigration matters and that it violates [his] substantive due process rights under the Due Process Clause of the Fifth Amendment to the Constitution."

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[1] Immigration parole adopts the fiction that Rosales has never entered this country. *See Vargas v. Swan*, 854 F.2d 1028, 1029 (7th Cir. 1988). Despite his parole and physical presence within the United States, the INS treats Rosales as though he has not been admitted into this country, and, legally, he remains at "the threshold of initial entry." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S. Ct. 625, 97 L. Ed. 956 (1953). Therefore, he "stands on a different footing" than an alien who has already passed through this nation's gates. *Id.*

In reaching the foregoing conclusion, the majority does not dispute three key points. First, the executive and legislative branches of the government have almost complete control over matters involving immigration and the exclusion of aliens, with virtually no interference from the judiciary. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L. Ed. 956 (1953). Second, the government has the right to designate Rosales an excludable alien and to attempt to remove him. Rosales has no constitutional right to enter this country, and any attempt to do so is a request for a privilege. This privilege must be exercised in accordance with procedures established by Congress and implemented by the executive branch. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-544, 70 S. Ct. 309, 94 L. Ed. 317 (1950). Third, the "entry fiction" applies to this case. The entry fiction treats an excludable alien "as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States." *Ma v. Reno*, 208 F.3d 815, 823 (9th Cir.), *cert. granted*, — U.S. —, 121 S. Ct. 297, 148 L. Ed. 2d 239 (2000). The majority acknowledges that, under the entry fiction, individuals such as Rosales are "treated as detained or 'excluded' at the border despite [their] physical presence in the United States." Indeed, the majority notes that such individuals "have no rights with regard to their entry or exclusion from this country and they are treated differently from those who have 'passed through our gates.'"

After recognizing the foregoing principles, the majority examines the "constitutional authority to detain indefinitely."[2] In so doing, the court properly notes that even excludable aliens are not completely without constitutional protection. Given that aliens have been extended certain Fifth, Sixth and Fourteenth Amendment rights, the majority concludes that *excludable* aliens such as Rosales possess a Fifth Amendment liberty interest in freedom from indefinite detention by the INS. After also recognizing that Congress may not authorize immigration officials to treat excludable aliens with "complete impunity" by executing or torturing them, the majority reasons:

> . . . . We therefore find ourselves asked to draw a line of constitutional dimension between the act of torturing an excludable alien and the act of imprisoning such an alien indefinitely. We do not believe that the Constitution authorizes us to draw such a line. While it is true that aliens are not entitled to enjoy all the advantages of citizenship, *see Diaz*, 426 U.S. at 78, 96 S. Ct. 1883, we emphasize that aliens—even excludable aliens—are "persons" entitled to the Constitution's most basic protections

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[2] Before examining the constitutional issue, the majority resolves several other issues. *First*, the majority concludes that the district court possessed jurisdiction to hear Rosales's claim and that this court has jurisdiction to hear his appeal. *Second*, the majority finds that Rosales's appeal has not been rendered moot by virtue of the INS issuing a Notice of Releasability. *Third*, the majority concludes that the Attorney General and the INS *do* possess the *statutory* authority to detain Rosales indefinitely. I agree with each of these conclusions for the reasons set forth by the majority.

> and strictures. We conclude that if Rosales is indeed being detained indefinitely, [as] discussed *infra*, his Fifth Amendment interest in liberty is necessarily implicated.

After finding that excludable aliens possess a liberty interest in freedom from indefinite bodily restraint, the majority concludes that Rosales's continued detention violates substantive due process. In reaching this conclusion, the majority relies upon the analytical framework set forth in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987). In *Salerno*, the Supreme Court explained that whether a restriction on liberty (in the form of pretrial detention) violates substantive due process turns upon whether the detention is *punishment* without a trial or whether it is *regulatory* in nature. *Id.* at 746-747, 107 S. Ct. 2095. Absent evidence that Congress intended to punish excludable aliens by detaining them indefinitely,[3] the punitive/regulatory distinction itself turns on (1) whether the detention is rationally related to some alternative (*i.e.*, non-punitive) purpose, and (2) whether the detention appears excessive in relation to the alternative purpose that Congress sought to achieve. *Id.* at 747, 107 S. Ct. 2095.

Applying the foregoing test, the majority notes that the United States has identified as its "alternative purpose" in detaining Rosales "the need to protect society from a person who poses a danger to the safety of other persons or to property. . . ." The court then

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[3] The majority finds no evidence that Congress intended to punish Rosales and other excludable aliens by detaining them indefinitely. I agree with this aspect of the majority's reasoning.

recognizes that Rosales's detention *is* "rationally related" to the government's "alternative" purpose of public safety. Nevertheless, the majority concludes that his indefinite detention is "excessive" in relation to the government's alternative (*i.e.*, non-punitive) purpose, given (1) the probability that he never will return to Cuba and (2) the fact that he "can never be certain of receiving [immigration] parole, no matter how well he behaves himself in detention." As a result, the court concludes that his "detention has crossed the line from permissive regulatory confinement to impermissible punishment without trial . . . ." Consequently, the majority orders his immediate release.

Having reviewed the majority's analysis, I disagree with it in two primary respects. *First*, I do not believe that the indefinite detention of an excludable alien such as Rosales implicates any protected liberty interest in freedom from bodily restraint. *Second*, even assuming, arguendo, that a Fifth Amendment liberty interest is implicated, I do not believe that Rosales's detention, which includes annual review for parole eligibility, is excessive in relation to the government's non-punitive purpose. Consequently, under *Salerno*, his detention is regulatory in nature rather than punitive, and it does not violate substantive due process, even if a protected liberty interest is at stake.

Concerning the first issue, the existence of a liberty interest, I do not dispute that excludable aliens possess *some* Fifth Amendment rights. It is true that neither the Attorney General nor the INS may shoot or torture Rosales without running afoul of his substantive due process rights. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1442 (5th Cir. 1993), *amended* 997 F.2d 1122 (5th Cir. 1993) (recognizing that ex-

cludable aliens have a substantive due process right to be free from "gross physical abuse"). The majority's ruling turns upon its inability to "draw a line of constitutional dimension between the act of torturing an excludable alien and the act of imprisoning such an alien indefinitely." The court concludes that the Constitution does not authorize the judiciary "to draw such a line."

Upon review, however, I cannot agree that drawing a line between torturing an excludable alien and indefinitely detaining him to ensure exclusion from this country violates the Constitution. The government's indefinite detention of an excludable alien simply is not equivalent, for Fifth Amendment purposes, to torturing him or to killing him. It has been generally accepted that "[e]xcluded aliens may be able to challenge, under a constitutional theory, governmental action *outside of the immigration context.*"[4] *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 n.8 (11th Cir. 1984) (emphasis added) (citing *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979)); *see also Zadvydas v. Underdown*, 185 F.3d 279, 295 (5th Cir. 1999), *cert. granted*, — U.S. —, 121 S. Ct. 297, 148 L. Ed. 2d 239 (2000) (recognizing that excludable aliens may have substantive due process rights, but only with respect to matters that are unrelated to the government's plenary power over immigration). However, this principle does not "limit the government's conduct in the immigration field where it

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[4] *But see Ma*, 208 F.3d at 824 (stating that "it is 'not settled' that excludable aliens have any constitutional rights at all"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5, 73 S. Ct. 472, 97 L.Ed. 576 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161, 65 S. Ct. 1443, 89 L.Ed. 2103 (1945) (Murphy, J., concurring) ("'The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.'")).

possesses plenary authority." *Fernandez-Roque*, 734 F.2d at 582 n.8 (citing *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd* 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985)). In *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987), the court articulated a clear rationale for drawing "a line of constitutional dimension" between torturing an excludable alien and detaining him indefinitely:

> The basis for limiting the constitutional protection afforded excludable aliens has been the overriding concern that the United States, as a sovereign, maintain[s] its right to self-determination. "As the history of its immigration policy makes clear, this nation has long maintained as a fundamental aspect of its right to self-determination the prerogative to determine whether, and in what numbers, outsiders without any cognizable connection to this society shall be permitted to join it." Courts ordinarily should abstain from placing limits on government discretion in these circumstances because the sovereign interest in self-determination weighs so much more heavily in this scheme than does the alien's interest in entering the country. That interest, however, plays virtually no role in determining whether the Constitution affords any protection to excludable aliens while they are being detained by state officials and awaiting deportation. Counsel has not suggested and we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment on a person in United States territory simply because that person is an excludable alien. We therefore hold that, whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled

> under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.

Id. at 1373-74 (footnotes omitted); *see also Gisbert*, 988 F.2d at 1442 ("*Lynch* plainly recognizes that excludable aliens may legally be denied other due process rights, *including* the right to be free of detention.").[5]

In the present case, the government is not endeavoring to deprive Rosales of life or property, nor is it seeking to deprive him of liberty, except to the extent necessary to exclude him from this country, which the majority concedes the INS has an absolute right to do. It is in *this* context that Rosales has no liberty interest protected by the Fifth Amendment.[6] *See Fernandez-*

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[5] In *Gisbert*, the Fifth Circuit expressly rejected the position taken by the majority herein that the indefinite detention of Mariel Cubans constitutes punishment without a trial in violation of their substantive due process rights. *Gisbert*, 988 F.2d at 1441-42.

[6] When engaging in a substantive due process analysis, a court must begin with "a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). In the present case, Rosales does not dispute the Attorney General's power to exclude him or to detain him for a reasonable time to effect his return to Cuba. Rather, he claims that, because Cuba refuses to accept him, his detention is indefinite, and possibly permanent, thus constituting punishment without a trial. Rosales contends, and the majority agrees, that he has a liberty interest in being free from this type of detention. If his habeas petition is granted, however, he will be awarded the very right that the government lawfully denied to him as a result of his exclusion, namely the right to be at large in the United States. Although Rosales characterizes his request as one to be released from incarceration, the relief that he seeks is indistinguishable from a request to be admitted into this country until his return to Cuba can be arranged. As set forth more fully, *supra*, Rosales has no

Roque, 734 F.2d at 582 (footnote omitted) ("[W]e are compelled to conclude that [immigration] parole is part of the admissions process. As such, its denial or revocation does not rise to the level of a constitutional infringement. Because the Cubans lack a constitutional liberty interest, we need not reach the question of whether the Attorney General's plan satisfies due process."); *Ma*, 208 F.3d at 824 (quoting *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995)) (citations omitted) ("Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution. Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.").

While it would indeed shock the conscience to permit the INS to shoot or to torture a person seeking entry into the United States, it is not conscience shocking to allow the INS to enforce its immigration policies by indefinitely detaining such a person at the border when he will not or cannot go elsewhere.[7] The Supreme

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constitutional right to be released into this country, and the government has an absolute right to ensure his exclusion.

[7] As noted, *supra*, the majority does not question the applicability of the "entry fiction," which treats Rosales as if he is being detained at the border, despite his physical presence in the United States. Although the entry fiction may appear to be draconian in operation, it has a humanitarian purpose. The entry fiction is a compassionate response to the hardships that surely would have befallen Rosales if INS representatives had prevented him and other Mariel Cubans from bringing their boats ashore, as the government unquestionably had the right to do. In other words, the United States lawfully could have forced Rosales and the other Mariel Cubans to remain at sea, where they almost

Court has long held that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982). "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 79-80, 96 S. Ct. 1883. Indeed, "[c]ourts have long recognized that the governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict." *Zadvydas*, 185 F.3d at 289.

Consistent with the foregoing principles, the federal circuit courts routinely have rejected constitutional arguments that are similar, if not identical, to the one advanced by Rosales in the present case. Most recently, the Seventh Circuit rejected a substantive due process challenge to indefinite confinement in *Carrera-Valdez v. Perryman*, 211 F.3d 1046 (7th Cir. 2000),[8] reasoning as follows:

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certainly would have died from drowning, dehydration or starvation. Instead, the government allowed Rosales and the others to come ashore, under the entry fiction, which treats the Mariel Cubans as if they are still at sea, and outside of U.S. territory, for immigration purposes.

[8] The facts of *Carrera-Valdez* are similar to those of the present case. The petitioner in *Carrera-Valdez* was a Mariel Cuban who was declared excludable following his arrival in this country. Like Rosales, the petitioner in *Carrera-Valdez* was released several times on immigration parole only to be taken into custody after committing crimes here. He sought a writ of habeas corpus ordering his release until he could be returned to Cuba. *Carrera-Valdez*, 211 F.3d at 1047.

> Almost fifty years ago, the Supreme Court held that an excludable alien may be detained indefinitely when his country of origin will not accept his return. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953). Several Justices in more recent years have expressed unease with that decision, but it is conclusive in the courts of appeals. It is therefore not surprising that at least five appellate courts have rejected constitutional challenges, similar to Carrera's, brought by others who arrived on the Mariel boatlift. *See Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, amended, 997 F.2d 1122 (5th Cir. 1993); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986). *See also Chi Thon Ngo* v. *INS*, 192 F.3d 390 (3d Cir. 1999). The only arguably contrary decision, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), has not garnered adherents and is of doubtful vitality in its own circuit. *Duy Dac Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000). Given *Shaughnessy* there is little point in elaborate discussion by an inferior court. Carrera is not constitutionally entitled to release.

Id. at 1048.[9]

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[9] The majority cites *Carrera-Valdez* and *Gisbert* for the proposition that the Attorney General has the *statutory* authority to detain an excludable alien indefinitely, while failing to acknowledge that those cases also stand for the proposition that an excludable alien has no *constitutional* right to be free from indefinite detention.

In finding that excludable aliens have no constitutional right to be free from indefinite immigration detention, the federal courts have relied largely upon *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953), in which the Supreme Court held that an excludable alien may be detained indefinitely, without violating the Constitution, when his country of origin will not accept his return.[10] In *Mezei*, the Court reasoned as follows:

> . . . Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute, it authorized, in cases such as this, aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. . . . And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border.

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[10] Although the alien in *Mezei* had lived in the United States for approximately 25 years, he left this country in 1948, without authorization or reentry papers, and resided in Hungary for 19 months. *Mezei*, 345 U.S. at 208, 214, 73 S. Ct. 625. In light of those facts, the Supreme Court had "no difficulty in holding respondent an entrant alien or 'assimilated to [that] status' for constitutional purposes." *Id.* at 214, 73 S. Ct. 625 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 599, 73 S. Ct. 472, 97 L.Ed. 576 (1953)).

> Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right. . . .

Id. at 215 (citations and footnotes omitted).

The majority reasons that *Mezei* is distinguishable because it was decided in the midst of the Korean War and it involved an individual whom the executive branch had classified as a national security threat. The majority suggests that the *Mezei* Court found no constitutional violation flowing from the alien's indefinite detention precisely because of the national security concerns at issue. Given that such "incomparable exigencies" do not exist in the present case, the majority reasons that *Mezei* is distinguishable.

Having reviewed *Mezei*, I cannot agree with the majority's reading of the opinion. In *Mezei*, the Supreme Court cited the Korean War and national security concerns as the impetus behind the Attorney General's decision to exclude an alien, pursuant to the Passport Act of 1918, which permitted the executive branch "to shut out aliens whose 'entry would be prejudicial to the interests of the United States.'" *Mezei*, 345 U.S. at 210, 73 S. Ct. 625; *see also id.* at 216, 73 S. Ct. 625 (characterizing the alien's continued detention as "[a]n exclusion proceeding grounded on danger to the national security"). "[T]imes being what they [were]," the Court also recognized that Congress had declined to authorize the release of excludable aliens such as Mezei. *Id.* at 216, 73 S. Ct. 625. The *Mezei* Court then noted that it lacked the authority to substitute its judgment for that of Congress with respect to the legislative determination that individuals such as *Mezei* were to be excluded and not released. *Id.* ("Whatever our individual estimate of [the policy

mandating Mezei's exclusion and indefinite detention] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.").

Although national security concerns may have prompted the Attorney General to exclude and to detain Mezei under legislation passed by Congress, the Supreme Court did not rely on national security concerns to support its determination that he lacked a substantive due process right to be free from indefinite detention.[11] Rather, the Supreme Court's constitutional analysis turned on the more fundamental fact that Mezei, an excludable alien, had no constitutional rights at all. *Id.* at 215, 73 S. Ct. 625 (reasoning that Mezei's continued exclusion on Ellis Island did not deprive him of any constitutional rights because he was "treated as if stopped at the border[,]" despite his physical presence in the United States). While Congress had provided for *resident* aliens to be released on bond pending deportation, the *Mezei* Court noted that no similar statutory authority existed for the release of *excludable* aliens. The Supreme Court also recognized that Congress's failure to provide for the release of individuals such as Mezei likely stemmed from fears

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[11] In fact, as noted above, the Supreme Court appeared to question whether Mezei was even a true national security risk. *Mezei*, 345 U.S. at 216, 73 S. Ct. 625 ("Whatever our individual estimate of [the policy mandating Mezei's exclusion and indefinite detention] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.").

associated with the Korean War. *Id.* at 216, 73 S. Ct. 625. Although it questioned that congressional policy "and the fears on which it rest[ed]," the Supreme Court upheld Mezei's indefinite detention because, as an excludable alien, *he had no constitutional rights* and his right to enter the United States depended solely "on the congressional will[.]" *Id.* at 215-216, 73 S. Ct. 625.

Contrary to the majority's assertion herein, the *Mezei* Court did not cite the Korean War and national security concerns as the impetus behind its determination that Mezei's confinement violated no constitutionally protected right. In other words, the Court did not suggest that Mezei *would* have had a constitutionally protected liberty interest in freedom from bodily restraint but for the conflict in Korea. To the contrary, the Court found no due process violation because Mezei, an alien seeking initial entry, had no constitutional right to enter the United States at all. *Id.* at 215, 73 S. Ct. 625 ("While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships . . . persuaded Congress to adopt a more generous course. . . . But such temporary harborage, an act of legislative grace, bestows no additional rights. . . . Thus, we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right."). Absent a constitutional right to enter this country, Mezei simply had no liberty interest in being free from indefinite detention to effect his exclusion. The "exigencies" associated with the Korean War were not crucial to the Court's resolution of this constitutional issue.[12] Rather, those national security

[12] It is noteworthy that the Supreme Court did not even require the Attorney General to divulge the evidence upon which he based

concerns merely explained why the Attorney General had exercised his statutory authority to exclude and to detain Mezei. Notably, a number of other circuit courts have also read *Mezei* as standing for the proposition that an excludable alien has no liberty interest in freedom from indefinite immigration detention. *See, e.g., Carrera-Valdez*, 211 F.3d at 1048 ("Almost fifty years ago, the Supreme Court held that an excludable alien may be detained indefinitely when his country of origin will not accept his return. . . . Given [*Mezei*]

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his determination that Mezei constituted a threat to national security. *Mezei*, 345 U.S. at 212, 73 S. Ct. 625. The Court's refusal to "retry the determination of the Attorney General" by requiring such evidence to be revealed would be peculiar if the absence of a substantive due process right turned upon exigencies attributable to the Korean War. In other words, if the Supreme Court believed that Mezei lacked a substantive due process right to be free from indefinite detention only because of exigencies created by the Korean War, it seems likely that the Court would have required the Attorney General to present *some evidence* showing that those exigencies actually existed. The Court did not do so, however, for at least two reasons. *First*, Mezei's confinement was an act of exclusion, and the decision of the Attorney General to exclude an alien is "final and conclusive[.]" *Id. Second*, Mezei's continued exclusion on Ellis Island did not deprive him of any constitutional right, not because of national security concerns and the Korean War, but because he was treated as if detained outside of U.S. territory and, therefore, he *had no* substantive due process rights. *Id.* at 215, 73 S. Ct. 625; *see also* Ethan A. Klingsberg, Note, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 Yale L.J. 639, 643-644 (1989) (recognizing that *Mezei* rests upon the "principle that an alien arrives at the border without an interest in the right to enter" and, as a result, lacks a liberty interest in freedom from immigration detention). Consequently, the Attorney General's national security concerns were not critical to the *Mezei* Court's substantive due process analysis, despite the majority's assertion to the contrary.

there is little point in elaborate discussion by an inferior court. Carrera is not constitutionally entitled to release."); *Ma*, 208 F.3d at 823 ("While the Court held that Mezei could be detained indefinitely on Ellis Island, because no country would take him back, it rested its holding on the fact that Mezei's exclusion did not violate the immigration statute, and that as an alien who had not yet entered the country he had no other rights."); *Fernandez-Roque*, 734 F.2d at 582.

The majority also asserts that the government's reading of *Mezei* is contrary to "a long line of Supreme Court decisions extending to aliens basic Fifth, Sixth, and Fourteenth Amendment protections. . . ." Most of the decisions upon which the majority relies, however, involved aliens who *had entered* the United States, either legally or otherwise. *See, e.g., Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971); *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 L.Ed. 140 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220 (1886).

When considering the constitutional protection to which an alien is entitled, the Supreme Court has long distinguished between aliens who have entered the United States, even if their presence here is illegal, and aliens who have not yet entered this country. *See, e.g., Yick Wo*, 118 U.S. at 369, 6 S. Ct. 1064 (recognizing that the protections of the Fourteenth Amendment extend "to all persons within the territorial jurisdiction" of a state); *Johnson v. Eisentrager*, 339 U.S. 763, 770-771, 70 S. Ct. 936, 94 L.Ed. 1255 (1950) (noting that "presence"

in the United States gives an alien certain rights, and acknowledging that the Supreme Court has "extended to the person and property of resident aliens important constitutional guaranties"); *Plyler*, 457 U.S. at 212, 102 S. Ct. 2382 (recognizing that the Fifth, Sixth and Fourteenth Amendments have a "territorial theme," as the protections provided by those Amendments apply "'to all persons within the territory of the United States,' including aliens unlawfully present"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (recognizing that various constitutional protections have been afforded to aliens who are present in the United States, whereas aliens who are not voluntarily within this nation's borders have not been granted the same protections).[13]

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[13] In *Verdugo-Urquidez*, the Supreme Court reviewed several of the cases cited by the majority herein. According to the *Verdugo-Urquidez* Court, those cases stand for the proposition that aliens enjoy constitutional protections once they enter the United States:

> Verdugo-Urquidez also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 211-212, 102 S. Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S. Ct. 472, 477, 97 L.Ed. 576 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 1449, 89 L.Ed. 2103 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S. Ct. 229, 75 L.Ed. 473 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 981, 41 L.Ed. 140 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 1070, 30 L.Ed. 220 (1886) (Fourteenth Amendment protects resident aliens). These cases, however, establish only that aliens receive consti-

Without question, aliens who are present in the United States do enjoy significant constitutional protections. In Rosales's case, however, the entry fiction treats him as if he remains detained at the border and not present in the United States. *See, e.g., Ma*, 208 F.3d at 824 (quoting *Barrera-Echavarria*, 44 F.3d at 1450) (recognizing that " 'excludable aliens are deemed under the entry doctrine not to be present on United States territory' "). The majority does not dispute the applicability of the entry fiction herein. Consequently, the "long line" of Supreme Court precedent cited by the majority does not controvert the government's reading of *Mezei*, which involved an excludable alien who, under the entry fiction, remained detained at this nation's border and, like Rosales, *was not present* in the United States.[14]

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tutional protections when they have come within the territory of the United States and developed substantial connections with this country. *See, e.g., Plyler, supra*, 457 U.S., at 212, 102 S. Ct., at 2392 (The provisions of the Fourteenth Amendment " 'are universal in their application, *to all persons within the territorial jurisdiction . . .*' ") (quoting *Yick Wo, supra*, 118 U.S., at 369, 6 S. Ct., at 1070); *Kwong Hai Chew, supra*, 344 U.S., at 596, n.5, 73 S. Ct., at 477, n.5 ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. *But once an alien lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders") (quoting *Bridges, supra*, 326 U.S., at 161, 65 S. Ct., at 1455 (concurring opinion) (emphasis added)). Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.

Verdugo-Urquidez, 494 U.S. at 270-71.

[14] Despite the fact that the Fifth, Sixth and Fourteenth Amendments have a "territorial theme" and, therefore, apply " 'to all

In short, Rosales's substantive due process claim is a victim of the entry fiction. As noted above, that doctrine treats an excludable alien "as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States." *Ma*, 208 F.3d at 823. Although Rosales may have a Fifth Amendment liberty interest in not being shot or tortured, he simply has no protected liberty interest in freedom from being detained indefinitely at this country's border.[15] This is so because he has no consti-

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persons within the territory of the United States,'" *Plyler*, 457 U.S. at 212, 102 S. Ct. 2382, some courts have held that excludable aliens may rely upon the Constitution to challenge "governmental action outside of the immigration context." *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 n.8 (11th Cir. 1984); *see also Gisbert*, 988 F.2d at 1442 (recognizing that excludable aliens have a substantive due process right to be free from "gross physical abuse"); *but see Ma*, 208 F.3d at 824 ("[I]t is not settled that excludable aliens have any constitutional rights at all [.]"). Even if excludable aliens may challenge governmental conduct *outside* of the immigration context, however, the act of detaining an alien to effect his exclusion from the United States constitutes governmental action *within* the immigration context. As a result, excludable aliens such as Rosales have no substantive due process right to be free from immigration detention. *See, e.g., Ma*, 208 F.3d at 824; *Carrera-Valdez*, 211 F.3d at 1048.

[15] Preventing the INS from killing or torturing Rosales does not infringe upon the government's plenary power to exclude aliens at our borders. Consequently, as noted, *supra*, some courts have recognized that excludable aliens have a protected liberty interest in not being physically abused. Preventing the INS from indefinitely detaining Rosales in order to ensure his exclusion, however, would interfere with the government's fundamental sovereign authority to control its borders.

tutional right to enter the United States,[16] and the Attorney General has an absolute right to effect his exclusion.[17] "[A] constitutionally protected [liberty] interest cannot arise from relief that the executive exercises unfettered discretion to award." *Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999). Adopting the majority's reasoning would mean that "[a] foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back." *Jean*, 727 F.2d at 975. As a practical matter, such a rule would bestow upon foreign leaders the power to dictate U.S. immigration policy. *Cf. Gisbert*, 988 F.2d at 1447 ("Accepting petitioners' arguments here would allow one country to export its unwanted nationals and force them upon

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[16] "It is beyond dispute that aliens have no constitutional right to be admitted into this county." *Fernandez-Roque*, 734 F.2d at 581 (quoting *Landon*, 459 U.S. at 32, 103 S. Ct. 321); *see also Jean*, 727 F.2d at 972 ("[E]xcludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right."). Immigration "[p]arole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air." *Id.*

[17] This is not to say that the Attorney General could detain Rosales indefinitely if some other country were willing to accept him. Under those circumstances, which do not exist here, his continued detention likely would violate the Constitution. In other words, the United States lawfully may detain Rosales in order to regulate its border and prevent him from entering, but it cannot constitutionally prevent him from vacating the border and going elsewhere. Notably, however, Rosales's habeas petition does not suggest that he or his relatives, who are living in Florida, have arranged for him to leave the United States. Instead, he wants to be released into this country.

another country by the simple tactic of refusing to accept their return. . . . The United States cannot be forced to violate its national sovereignty in order to parole these aliens within its borders merely because Cuba is dragging its feet in repatriating them."); *Barrera-Echavarria*, 44 F.3d at 1448 ("A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel refugees.").

Even assuming, arguendo, that a Fifth Amendment liberty interest is implicated, Rosales's detention, which includes annual review for parole eligibility, is not excessive in relation to the government's concern about protecting society from a criminal alien who previously has committed felony offenses while on immigration parole. In *Alvarez-Mendez v. Stock*, 941 F.2d 956 (9th Cir. 1991), the court reached a similar conclusion with respect to a detained Mariel Cuban, applying the balancing-of-interests approach set forth in *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095, and adopted by the majority herein. In relevant part, the *Alvarez-Mendez* court reasoned as follows:

> A detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. *White v. Roper*, 901 F.2d 1501, 1504 (9th Cir. 1990). Not all detention, however, is punishment. *Bell v. Wolfish*, 441 U.S. 520, 539 n.20, 99 S. Ct. 1861, 1874 n.20, 60 L. Ed. 2d 447 (1979). In the absence of express intent to punish, the most significant factors in identifying punishment are "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and

> whether it appears excessive in relation to the alternative purpose assigned [to it]." *United States v. Salerno*, 481 U.S. 739, 747, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1987) (quotations omitted).
>
> In denying Alvarez-Mendez reparole, the Associate Commissioner cited Alvarez-Mendez's criminal arrests and convictions, and concluded on the basis of these crimes that it was unlikely that Alvarez Mendez would "remain non-violent or honor the conditions of parole if released." Protecting society from a potentially dangerous alien is a rational, non-punitive purpose for Alvarez Mendez's detention. Because such protection requires separating Alvarez Mendez from society, and because immediate removal from the country is not possible, detention is not an excessive means of accomplishing such protection.

Id. at 962.

The Fifth Circuit subsequently cited *Alvarez-Mendez* with approval in *Gisbert*, 988 F.2d at 1442, concluding that the continued detention of Mariel Cubans "is not punishment" and is not excessive in relation to the government's rational purpose of protecting society from potentially dangerous aliens. This is particularly true in the present case, given that Rosales continues to receive annual consideration for immigration parole, despite the fact that he has twice committed serious offenses while on such parole. *Cf. Barrera-Echavarria*, 44 F.3d at 1450 ("When viewed in this light, as a series of one-year periods of detention followed by an opportunity to plead his case anew, we have no difficulty concluding that Barrera's detention is constitutional under *Mezei*."); *Chi Thon Ngo v. I.N.S.*, 192 F.3d 390,

398 (3rd Cir. 1999) ("We therefore hold that excludable aliens with criminal records as specified in the Immigration Act may be detained for lengthy periods when removal is beyond the control of the INS, provided that appropriate provisions for parole are available."); *id.* at 399 ("So long as petitioner will receive searching periodic reviews, the prospect of indefinite detention without hope for parole will be eliminated. In these circumstances, due process will be satisfied."); *Zadvydas*, 185 F.3d at 297 n.19 (noting that "the detention of certain classes of persons to protect society at large is not wholly alien to our constitutional order and has been allowed in special situations when, as here, there are procedures to insure that detention must be periodically reviewed").

In opposition to the foregoing conclusion, the majority reasons that "the strength of the government's interest in protecting the community and enforcing its immigration laws must be considered in relation to the possibility that the government may actually achieve its goal to effect Rosales's deportation." Given that Rosales is unlikely ever to be returned to Cuba, the court concludes that the strength of the government's interest diminishes to the point that it is outweighed by Rosales's liberty interest in freedom from bodily restraint. Specifically, the majority states that "Rosales's confinement can only be considered excessive in relation to the purpose of protecting the community from danger and enforcing an immigration order that is, at present, unenforceable."

By detaining Rosales, however, the government *is enforcing* immigration law and the order excluding Rosales from this country. Under the entry fiction, the applicability of which the majority does not dispute,

Rosales is being detained at the border because he has no legal right to enter this country. He continues to have no legal right to enter this country, regardless of how long he remains waiting at the border. Therefore, by refusing to release Rosales into the United States, the Attorney General is unquestionably enforcing immigration policy, which includes not only deporting him but also excluding him. The fact that Cuba will not accept his return does not alter the fact that the government is enforcing both its immigration law and Rosales's order of exclusion simply by ensuring his exclusion from U.S. territory. Indeed, the *only* way that U.S. immigration policy and the order of exclusion will be rendered "unenforceable" is if this court orders an excludable alien such as Rosales to be released into the general population. Finally, the fact that Cuba will not accept Rosales's return does not alter the fact that the government is ensuring public safety by detaining Rosales, a person who has committed felony offenses in the United States, subject to annual review for purposes of determining his eligibility for immigration parole.[18]

Based on the reasoning and citation of authority set forth above, I conclude that Rosales lacks a liberty interest in freedom from continued detention by the INS. Even assuming, arguendo, that he does possess

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[18] The majority appears to find a substantive due process violation in part because Rosales cannot be "certain" of receiving immigration parole, regardless of how well he behaves while he is detained. Given that Rosales has no right to enter this country at all, however, the fact that he cannot be "certain" of being paroled into the United States does not give rise to a substantive due process violation.

such an interest, I find that it is outweighed by the government's regulatory interest in enforcing immigration laws and providing for public safety. Consequently, Rosales's indefinite confinement does not violate substantive due process.

In conclusion, I pause briefly to note my agreement with the district court's determination that Rosales's procedural due process rights have not been violated. Although the majority fails to reach this issue, given its finding of a substantive due process violation, the Supreme Court has recognized that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff*, 338 U.S. at 544, 70 S. Ct. 309; *see also Mezei*, 345 U.S. at 212, 73 S. Ct. 625. Consequently, the district court properly examined the Attorney General's Cuban Review Plan, found at 8 C.F.R. § 212.12, to identify the procedural rights at issue. *See, e.g., Garcia-Arena v. Luttrell*, 238 F.3d 420, 2000 WL 1827855 at *2 (6th Cir. Dec. 8, 2000) (unpublished) (recognizing that excludable aliens are entitled to only the procedural rights provided by 8 C.F.R. § 212.12).

The crux of Rosales's argument on appeal does not appear to be that the INS violated the procedure set forth in 8 C.F.R. § 212.12 when it declined to grant him immigration parole. Rather, Rosales appears to argue that the INS violated procedural due process rights emanating from the Constitution.[19] Stated differently,

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[19] As the majority properly notes, Rosales alleged in his habeas petition that he was deprived of his Fifth and Fourteenth Amendment rights (1) to be represented by counsel at the parole hearing, (2) to review the information used against him at that proceeding, and (3) to confront and cross-examine witnesses. Rosales also alleged that the INS had miscalculated his parole candidacy score.

Rosales suggests that the immigration parole procedure contained in 8 C.F.R. § 212.12 is itself deficient because it does not afford him certain due process rights guaranteed by the Constitution.[20] However, in *Betancourt v. Chandler*, 230 F.3d 1357, 2000 WL 1359634 at *2 (6th Cir. Sept. 14, 2000) (unpublished), a

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In particular, he alleged that the INS had improperly enhanced his score to account for prior criminal offenses, *not* in violation of 8 C.F.R. § 212.12, but rather in violation of the Federal Rules of Evidence, Title 28 of the United States Code and the United States Sentencing Guidelines. J.A. at 6-7. Rosales did allege in his habeas petition, however, that the INS had violated 8 C.F.R. § 212.12 by relying upon impermissible reasons to support its denial of immigration parole. J.A. at 7. Although Rosales does not appear to pursue this claim on appeal, it lacks merit in any event. The INS denied Rosales immigration parole largely because it was unable to conclude that he would not pose a threat to the community, as evidenced by his recidivist criminal behavior. J.A. at 133. This explanation plainly constitutes a proper basis to deny immigration parole. *See* 8 C.F.R. § 212.12(d).

[20] Insofar as Rosales's appellate brief might be read to assert a violation of 8 C.F.R. § 212.12, any such claim is belied by the record. Among other things, he has been afforded periodic parole review, the services of a translator during his parole interview, decisions translated into Spanish, and notice of his right to have the assistance of a representative during his parole interview. J.A. at 130-139. Although Rosales stresses that he was not represented by counsel during the parole review process, § 212.12 does not guarantee such a right. Furthermore, this court has recognized that an excludable alien has "no constitutional right to counsel at his parole review hearings." *Fernandez-Santana v. Chandler*, 202 F.3d 268, 1999 WL 1281781 at *2 (6th Cir. December 27, 1999) (unpublished). Rosales also contends that, as a result of a language barrier, he was unable "to understand or communicate in lay or legal terms with his keepers." As noted above, however, Rosales was informed of his right to have a representative assist with his parole interview. J.A. at 131.

panel of this court recently recognized that excludable aliens are entitled to only those procedural rights provided by 8 C.F.R. § 212.12, not the Constitution. Absent a violation of § 212.12, which Rosales has not demonstrated, he has no procedural due process claim.

For the reasons set forth above, I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5698
D.C. No. 98-03081

REYNERO ARTEAGA CARBALLO,
PETITIONER-APPELLANT

v.

MARK LUTTRELL, WARDEN; IMMIGRATION AND
NATURALIZATION SERVICE,
RESPONDENTS-APPELLEES.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis
Julia S. Gibbons, District Judge

Submitted: March 9, 2001
Decided and Filed: October 11, 2001

Before: KRUPANSKY, BOGGS, and BATCHELDER, Circuit Judges.

OPINION

ALICE M. BATCHELDER, Circuit Judge.

Petitioner Reynero Arteaga Carballo, a Cuban citizen and national presently detained at the Federal Correctional Institution at Memphis, whom the Immigration and Naturalization Service ("INS") adjudged excludable, filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2241. Petitioner challenges the Attorney General's constitutional and statutory authority to continue his detention indefinitely following his completion of a state court sentence and transfer to federal custody to effect his deportation, which cannot occur in the foreseeable future because of the state of relations between the United States and Cuba. Further, Petitioner argues that his detention under these circumstances violates international law. Because Carballo raised substantially the same arguments in a prior petition, the district court ruled that the law of the case doctrine precluded reaching the merits of Petitioner's claims. This timely appeal followed. We will affirm the judgment of the district court, but for substantially different reasons.

I. Statement of Facts

A. The 1980 Mariel Boatlift

Carballo came to the United States as one of the more than 125,000 undocumented Cuban nationals who arrived during the "Freedom Flotilla," originating at the Cuban harbor of Mariel. In early April 1980,

approximately 10,800 Cuban citizens claimed status as political refugees and sought sanctuary in the Peruvian embassy in Havana. *United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983). On April 14, 1980, President Carter declared that up to 3,500 of those refugees would be admitted to the United States pursuant to the Refugee Act of 1980 and allocated $4.25 million for their resettlement. *Id.* (citing 45 Fed. Reg. 28,079 (Apr. 28, 1980)). Within three days of this announcement, Castro halted flights to the United States and declared that anyone wishing to leave the island could do so through the harbor of Mariel. *Id.* The exodus of more than 125,000 Cubans, who crossed the ninety miles of ocean between Cuba and the United States in nearly 1,800 boats, followed. *Alonso-Martinez v. Meissner*, 697 F.2d 1160, 1161 (D.C. Cir. 1983).

Most of the Mariel Cubans arrived without visas or documents allowing them legal entry into the United States. *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 (11th Cir. 1984). Immigration officials detained these aliens at the border and decided to exclude them from the United States.[1] About 25,000 of the arriving aliens confessed to some criminal history in Cuba, and immigration officials deemed roughly 2,000 of them to have

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[1] Immigration law draws a fundamental distinction between excludable aliens, those who seek admission but have not been granted entry to the United States and are considered detained at the border as a matter of law, and deportable aliens, those who have gained entry to the United States, whether legally or illegally. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159 & n.5 (1993). Since enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), "excludable" aliens are now denominated "inadmissible," and a process of "removal" has replaced "deportation." 8 U.S.C. §§ 1182 & 1229a.

backgrounds serious enough to warrant continued detention. *Palma v. Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982). The Attorney General paroled the remainder into the United States pursuant to his broad discretion under 8 U.S.C. § 1182(d)(5)(A). Though no longer detained, the Cubans retained their legal status as excluded aliens subject to deportation. *Fernandez-Roque*, 734 F.2d at 579. By the summer of 1981, 122,000 Cuban aliens had been paroled. *Palma*, 676 F.2d at 101 n.1.

Despite Cuba's initial refusal to accept the return of the Mariel refugees, *Fernandez-Roque*, 734 F.2d at 578, the United States has consistently taken the position that international law obligates Cuba to accept its nationals denied admission to the United States. *Gisbert* v. *United States Attorney Gen.*, 988 F.2d 1437, 1439 n.4 (5th Cir. 1993). On December 14, 1984, Cuba agreed to the return of 2,746 named Mariel refugees at a rate of one hundred per month in exchange for resumption of the normal processing of preference immigration visas for Cuban nationals as had occurred in this country prior to the Mariel boatlift. *Garcia-Mir v. Smith*, 469 U.S. 1311, 1312 (1985) (Rehnquist, Circuit Justice). This list comprises individuals whom the INS identified as possessing serious criminal backgrounds or mental infirmities and does not, in the estimation of the State Department, constitute a definitive or final group selected for repatriation. *Alvarez-Mendez v. Stock*, 746 F. Supp. 1006, 1010 (C.D. Cal. 1990), aff'd, 941 F.2d 956 (9th Cir. 1991). Cuba suspended the agreement in May 1985, but agreed at the end of 1987 to reinstate it. *Gisbert*, 988 F.2d at 1439 n.4. In 1994 and 1995 the United States concluded additional agreements on migration matters with Cuba, and the two nations have further agreed to additional discussions and have

undertaken ongoing negotiations over the return of Cuban nationals excludable from the United States. As of February 4, 1999, the United States has returned nearly 1,400 aliens named on the 1984 list to Cuba.

The Attorney General has promulgated regulations providing for annual review of the cases of Mariel Cubans who remain in custody pending deportation or removal to determine their suitability for immigration parole. 8 C.F.R. § 212.12 (2001). This process includes examination of each alien's records and an interview by special review panels. *Id.* § 212.12(d)(4). Before recommending immigration parole a review panel must conclude, based on consideration of the alien's record of criminal behavior, institutional disciplinary record, mental health history, and ties to the United States, that a detainee is: (1) nonviolent, (2) likely to remain nonviolent, (3) unlikely to pose a threat to the community upon release, and (4) not likely to violate any conditions of parole. *Id.* § 212.12(d)(2) & (3). The review panels make recommendations to the INS's Associate Commissioner for Enforcement ("Associate Commissioner"), who exercises authority to grant immigration parole in his discretion. *Id.* § 212.12(b) & (d)(4)(iii).

Cuba's reinstatement of the 1984 agreement in 1987 and the subsequent resumption of repatriations sparked riots among detained Mariel Cubans, resulting in at least one death and damages exceeding $100 million. *Padron-Baez v. Warden, FCI, Fairton*, No. 95-320, 1995 WL 419799, at *1 (D.N.J. July 10, 1995). As a result, on December 28, 1987, the Attorney General authorized a single, additional review of suitability for immigration parole by an independent panel within the Department of Justice for Mariel Cubans detained. 8

C.F.R. § 212.13 (1999) (removed from the Code of Federal Regulations by Exec. Order No. 12,988, 65 Fed. Reg. 80,294 (Dec. 21, 2000)). Presently, the United States holds approximately 1,750 Mariel Cubans in detention. *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 395 (3d Cir. 1999).

B. Petitioner's Criminal History

As far as state and federal authorities have been able to ascertain, Carballo's criminal record in Cuba consists of: (1) a six-month prison term in 1973 for being a Jehovah's Witness;[2] (2) a three-month period of detention for desertion from the army in 1975; and (3) his 1980 attempt to enter the Peruvian embassy. The Castro government issued Carballo exit documents, and he arrived in Florida with the wave of Mariel refugees on May 4, 1980. After a brief detention, the INS placed Carballo on immigration parole.

Almost immediately upon his release into the United States, Carballo developed a criminal record. His first arrest came on August 28, 1980, in Dade County, Florida, for grand larceny, carrying a concealed weapon, and carrying an unlicensed firearm. Although these charges were dismissed, Carballo's criminal record continued to grow, comprising at least sixteen arrests by early 1983 for crimes such as aggravated assault, burglary, battery, trespassing, and possession of marijuana. In April 1983, a Florida court found Carballo guilty of attempted first-degree murder, aggravated assault with a deadly weapon, and robbery and imposed a sentence of eight years imprisonment for

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[2] Some evidence in the record indicates that Carballo adopted this faith to aid his avoidance of military service in Cuba.

attempted murder, eight years for robbery, and five years for aggravated assault.

During Carballo's imprisonment, the INS conducted an investigation, revoked his immigration parole, and determined to commence exclusion proceedings upon his release from state custody. In February 1994, the INS formally initiated exclusion proceedings, which an immigration judge concluded later that year. The immigration judge ordered Carballo excluded and deported for, among other things, having been convicted of a crime of moral turpitude and of two or more offenses carrying an aggregate sentence of imprisonment exceeding five years. Carballo did not appeal this decision. Since his release from state custody, the INS has detained Carballo.

While in federal custody Carballo has developed a sizable disciplinary record. Incident reports show that he has committed assault, threatened bodily harm to a staff member, trespassed in an unauthorized area, and possessed marijuana.

Pursuant to the regulations governing Mariel Cubans, the INS has reviewed Carballo's case approximately annually to determine his suitability for immigration parole into the United States. On each occasion, the reviewing panel recommended against parole due to Carballo's lengthy criminal record, ongoing disciplinary problems, his apparent disregard for his criminal history, and his minimal participation in various programs in prison. Accordingly, the Associate Commissioner of the INS has to date denied Carballo parole. Neither Petitioner nor the government believes that Carballo's name appears on the 1984 list of Mariel Cubans whom Cuba agreed to repatriate; but, because that document remains classified, *Center for Nat'l Sec.*

Studies v. Department of State, No. 86-295, 1987 WL 17065 (D.D.C. Aug. 27, 1987), the record provides no definitive evidence on the matter.

C. Carballo's First Habeas Petition

On September 6, 1990, Carballo filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the Northern District of Texas. This petition challenged the authority of the Attorney General to continue the detention of an excludable alien after passage of a reasonable time to effect deportation. Additionally, Carballo argued that the continued denial of immigration parole occurred without due process of law and that international law prohibited the conditions and duration of his confinement.

Recognizing the plenary power of the political branches over immigration matters, a magistrate judge recommended denial of Carballo's petition on the ground that protection of the American public justified his continued confinement. Further, the magistrate judge reasoned that Carballo had regularly received all the process to which he is due through the INS's periodic review of his case pursuant to the Mariel regulations. Finally, the magistrate judge concluded that promulgation of these regulations displaced the public law of nations so that international law did not control Carballo's case. On November 26, 1991, the district court accepted the recommendation of the magistrate judge and entered an order denying Carballo's petition for a writ of habeas corpus. This order became final when Carballo failed to appeal.

II. Jurisdiction and Standard of Review

Under 28 U.S.C. § 2241 a petitioner may file a petition for a writ of habeas corpus in the district court having jurisdiction over his custodian. *Charles v. Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam). 8 U.S.C. § 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Notwithstanding this broad language, which on its face would appear to preclude judicial review of a habeas petition filed by an alien in Carballo's circumstance absent congressional direction to the contrary, the Supreme Court has concluded that section 2241 confers jurisdiction upon the federal courts to entertain statutory and constitutional challenges to an alien's detention following entry of an order of removal. *Zadvydas v. Davis*, 121 S. Ct. 2491, 2497-98 (2001). Therefore, we have jurisdiction to entertain Petitioner's appeal. We review the denial of a petition for a writ of habeas corpus de novo and the district court's factual findings for clear error. *Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998) (footnote omitted).

Based on the 1990 decision of a coordinate court, the district court invoked the law of the case doctrine and dismissed Carballo's petition. On appeal, Respondents urge affirmance on this ground or, in the alternative, on the ground that Carballo has not demonstrated cause and prejudice to justify consideration of a successive

and abusive petition. We turn first to the ground on which the district court denied Carballo's petition.

III. Law of the Case Doctrine

"Under the doctrine of the law of the case, a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation." *United States* v. *Todd*, 920 F.2d 399, 403 (6th Cir. 1990) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). Operation of this doctrine depends upon whether a court previously decided on a rule of law. *Christianson*, 486 U.S. at 817. Accordingly, the doctrine only applies to identical issues decided explicitly or by necessary inference. *Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997). Additionally, it applies with as much force to the decisions of a coordinate court as to a court's own decisions. *Christianson*, 486 U.S. at 816.

Rather than constituting a limit to judicial power, the doctrine expresses the general practice of courts to refuse to revisit settled matters. *Messinger v. Anderson*, 225 U.S. 436, 444 (1912); *Petition of U.S. Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973). These principles govern when the doctrine operates to give effect to the judgment of the same or a coordinate court; they "never block[] a higher court from examining a decision of an inferior tribunal." *In re Reliable Drug Stores, Inc.*, 70 F.3d 948, 951 (7th Cir. 1995). *See also Christianson*, 486 U.S. at 817-18 (explaining that "a district court's adherence to law of the case cannot insulate an issue from appellate review"). Nor can law of the case doctrine bind an appellate court in reviewing the decisions of a lower court. *Christianson*, 486 U.S. at 817. Nonetheless, we have held that when a party

fails to appeal a prior decision the doctrine will bar appellate review at a successive stage of the litigation:

> The law-of-the-case doctrine bars challenges to a decision made at a previous stage of the litigation which could have been challenged in a prior appeal, but [was] not. See *County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997). A party who could have sought review of an issue or a ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter, for "it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981).

United States v. Adesida, 129 F.3d 846, 850 (6th Cir. 1997).

Federal law treats each petition for a writ of habeas corpus as a separate civil action, rather than as a continuation of the criminal appeals process. *See, e.g., United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954) ("[The writ of error coram nobis] is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil Proceeding.") (citing *Kurtz v. Moffitt*, 115 U.S. 487, 494 (1885)). For this reason, we think that law of the case doctrine does not apply to second and successive petitions. Instead, a body of law governing abusive and successive petitions provides a check on the litigiousness of habeas petitioners. Therefore, we conclude that the district court erred in declining to consider Carballo's petition on this ground.

IV. Successive and Abusive Habeas Petitions

Respondents argue in the alternative that the court ought to dismiss the petition as successive and abusive. On appeal, Respondents maintain that both the statutory modifications governing successive and abusive petitions enacted in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217 ("AEDPA"), and abuse of the writ doctrine present additional hurdles to consideration of the merits of Carballo's petition.

Sections 105 and 106 of the AEDPA amended 28 U.S.C. §§ 2255 and 2244, respectively, to create a default rule requiring courts to dismiss second or successive petitions except in certain limited circumstances. By their terms neither of these "gatekeeping provisions" applies to petitions filed under section 2241. *In re Hanserd*, 123 F.3d 922, 930 (6th Cir. 1997) ("A § 2241 motion would not be barred by the new restrictions on successive motions and petitions."). Because section 2241 potentially allows a petitioner to evade these requirements, however, courts have attempted to define circumstances under which the AEDPA's new gatekeeping rules will bar a second or successive petition filed under section 2241. *E.g.*, *Charles*, 180 F.3d at 757 (holding that a petitioner will receive "only one bite at the post-conviction apple" unless he can show either that he has newly discovered evidence or that a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable applies); *United States v. Barrett*, 178 F.3d 34, 57 (1st Cir. 1999) (allowing a petitioner asserting a claim of actual innocence to use section 2241 to circumvent the gatekeeping provisions).

In the immigration context, section 2241 plays a somewhat different role since neither section 2244 nor section 2255 applies to a petitioner who is not in federal custody pursuant to a conviction in court. Section 2244(a) provides:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(Emphasis added). Because the INS continues to detain Carballo based on administrative actions taken pursuant to the Mariel regulations, rather than the judgment of a court, section 2244(a) by its own terms does not govern his petition for a writ of habeas corpus. *Barapind v. Reno*, 225 F.3d 1100, 1111 (9th Cir. 2000). For similar reasons section 2255, limited to "prisoners in custody under sentence of a court," does not apply. Accordingly, section 2241 provides the only avenue for Carballo to have access to a federal court to challenge his continued custody. See *INS v. St. Cyr*, 121 S. Ct. 2271, 2280 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention[.]").

Of course, this conclusion does not mean that unlike petitioners proceeding pursuant to sections 2254 or 2255, Carballo can expect a court to review his claims in second or successive petitions without limit. In fact, although section 2241 facially escapes the AEDPA's gatekeeping provisions, the general principles under-

lying these recently enacted limitations on the issuance of the writ inform a federal court's proper handling of second or successive petitions. In interpreting the effect of the AEDPA on its power to grant writs of habeas corpus filed as an original matter under section 2241, the Supreme Court has concluded:

> The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." In *McCleskey v. Zant*, 499 U.S. 467 (1991), we said that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.* at 489. The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process[.]

Felker v. Turpin, 518 U.S. 651, 664 (1996). Accordingly, even though the gatekeeping provisions do not expressly apply in the section 2241 context, "they certainly inform our consideration of original habeas petitions." *Id.* at 663. *See also Barapind*, 225 F.3d at 1111; *Gray-Bey* v. *United States*, 209 F.3d 986, 990 (7th Cir. 2000) ("[A] court in which a petition under § 2241 is filed must treat the new successive-petition rules as guideposts.").

Beyond these general principles the state of the law in the circuits remains unsettled regarding the circumstances under which a petitioner may bring a second or successive petition for a writ of habeas corpus under section 2241. We need not settle the matter today because, no matter what the standard, the doctrine of

successive and abusive petitions bars consideration of Carballo's petition.

A. Second and Successive Petitions under the AEDPA

Under section 2241(a) as amended by the AEDPA, federal courts can only entertain second or successive petitions under the terms prescribed by section 2255. 28 U.S.C. § 2255 allows consideration of a second or successive petition in two limited circumstances: (1) when a petitioner presents newly discovered evidence sufficient to establish by clear and convincing evidence that no finder of fact would have found the petitioner guilty; or (2) in the case of a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. Neither of these exceptions to the AEDPA's limitations on second and successive petitions applies here. Therefore, under the AEDPA's standard, we could not entertain Carballo's petition.

B. Traditional Successive Petition Doctrine

Notwithstanding Carballo's failure to satisfy all of the formal prerequisites for consideration of his second petition under the strictures of the AEDPA, we could arguably consider Carballo's claims under the traditional successive petition doctrine since the new gatekeeping provisions of the AEDPA merely "inform," rather than control, consideration of a second or successive petition under section 2241. Under the pre-AEDPA standard, when a court has denied a prior application for a writ of habeas corpus, that judgment will bar successive petitions if: (1) the earlier petition presented the same ground for relief, (2) the prior determination was on the merits, and (3) reaching the merits of a successive petition would not serve the ends

of justice. *Sanders v. United States*, 373 U.S. 1, 15 (1963); *Lonberger v. Marshall*, 808 F.2d 1169, 1173 (6th Cir. 1987). Under the "ends of justice" component of this standard, an applicant can file a successive petition "upon showing an intervening change in the law." *Sanders*, 373 U.S. at 16-17. *See also Lonberger*, 808 F.2d at 1174.

In light of this court's recent decision in *Rosales-Garcia v. Holland*, 238 F.3d 704 (6th Cir. 2001) (holding that indefinite detention violates the Due Process Clause of the Fifth Amendment), we must consider whether "an intervening change in the law" allows consideration of Carballo's petition. For the reasons that follow, we think that the Supreme Court's subsequent opinion in *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001), fatally undermines the authority of *Rosales-Garcia*. Accordingly, we conclude that even under the Sanders standard, Carballo's petition is barred.

1. The Statutory Basis for Carballo's Detention

We begin our analysis by examining whether the statute pursuant to which the INS continues to detain Petitioner authorizes indefinite detention. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (footnote omitted). Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), 8 U.S.C. § 1226(e) authorized the Attorney General to

detain excludable aliens indefinitely. That section provided:

> (1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation and regardless of the rearrest or further confinement in respect of the same offense).
>
> (2) Notwithstanding any other provision of this section, the Attorney General *shall not release such felon* from custody *unless* the Attorney General determines that the alien may not be deported because [a country "upon request denies or unduly delays acceptance of the return of any alien who is a citizen . . . thereof." 8 U.S.C. § 1253(g)].
>
> (3) If the determination described in paragraph (2) has been made, the Attorney General *may release* such alien *only after*—
>
> > (A) a procedure for review of each request for relief under this subsection has been established,
> >
> > (B) such procedure includes consideration of the severity of the felony committed by the alien, and
> >
> > (C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.

8 U.S.C. § 1226(e) (1994) (emphasis added). In short, former section 1226(e) unambiguously authorized the

Attorney General to retain custody of an excludable alien convicted of an aggravated felony unless he first determined both that the alien's native land has unduly denied or delayed deportation and that the alien will not pose a danger to the safety of people or property.

Congress enacted this provision in the Immigration Act of 1990, Pub. L. No. 101-649, § 504(b), 104 Stat. 4978, 5050. This statutory amendment took effect on November 29, 1990, and does not apply retroactively. Nonetheless, its provisions govern Carballo's petition for a writ of habeas corpus. In *Alvarez-Mendez v. Stock*, 941 F.2d 956 (9th Cir. 1991), the court considered the effect of the enactment of section 1226(e) on the habeas petition of a Mariel Cuban whom, like Carballo and all similarly situated aliens, the INS had adjudged excludable in 1980. The court concluded that section 1226(e) governed petitions filed after its effective date even in the case of an alien determined to be excludable prior to that date.

> Although the new section 1226(e) does not retroactively authorize any of the Attorney General's acts accomplished prior to the amendment, we are concerned here only with the legality of Alvarez-Mendez's present detention. Because this case involves a petition for the writ of habeas corpus, and not a claim for damages for illegal detention, the only issue before us is whether Alvarez-Mendez's detention is illegal today. Therefore, even if his detention was illegal prior to the 1990 Act, if that Act gives the Attorney General the authority to hold Alvarez-Mendez today, his present custody is not illegal and habeas corpus is not available.

Id. at 960. Since the Ninth Circuit offered this interpretation of former section 1226(e), other circuits that have considered whether it governs the detention of aliens found excludable prior to its enactment have concluded that it does. *Ho v. Greene*, 204 F.3d 1045, 1054-55 (10th Cir. 2000); *Gisbert*, 988 F.2d at 1446. We have adopted this interpretation. *Rosales-Garcia*, 238 F.3d at 715-16.[3]

Accordingly, former section 1226(e) provides the statutory basis for the INS's continued detention of Petitioner. Since immigration law without question defines Carballo's convictions as aggravated felonies within the meaning of former section 1226(e),[4] Petitioner faces potentially indefinite detention.

2. Former Section 1226(e) and the Supreme Court's Decision in Mezei

The overwhelming majority of circuits that have considered whether the former section 1226(e) constitutionally authorizes the indefinite detention of exclud-

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[3] The IIRIRA further amended section 1226(e) and created new statutory bases for detention of aliens; but, because section 309(c)(1) of the IIRIRA limits these amendments to removal proceedings initiated after its effective date of April 1, 1997, they have no effect on this action.

[4] 8 U.S.C. § 1101(a)(43), as in effect prior to enactment of the IIRIRA, defined "aggravated felony" to include "any crime of violence (as defined in section 16 of Title 18, not including a purely political offense) for which the term of imprisonment imposed . . . is at least 5 years." In turn, 18 U.S.C. § 16(a) defines "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Carballo's eight-year sentences for attempted murder and robbery and his five-year sentence for aggravated assault satisfy this definition.

able aliens have upheld the statute. *Carrera-Valdez v. Perryman*, 211 F.3d 1046 (7th Cir. 2000); *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999); *Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997) (per curiam); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc); *Gisbert v. United States Attorney Gen.*, 988 F.2d 1437 (5th Cir. 1993). *See also Fernandez-Rocque v. Smith*, 734 F.2d 576 (11th Cir. 1984) (rejecting constitutional challenges to indefinite detention arising from the denial or revocation of immigration parole); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982) (concluding that Congress had implicitly authorized the Attorney General to detain excludable aliens indefinitely).

Courts upholding the constitutionality of the Attorney General's authority to detain excludable aliens indefinitely rely principally on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (5-4 decision). In *Mezei*, the Supreme Court considered whether the Attorney General's permanent exclusion of an alien without a hearing constituted unlawful detention. *Id.* at 207. Having immigrated to the United States as a child, Mezei left the country in 1948 to visit his dying mother in Romania. Unable to obtain entry, he stayed in Hungary for over eighteen months and then attempted to return to the United States. Upon Mezei's arrival at Ellis Island, an immigration inspector ordered his temporary exclusion, which the Attorney General made permanent without a hearing on the basis of secret, undisclosed information that Mezei posed a security threat to the United States. Attempts to locate another nation to which Mezei could emigrate proved unsuccessful, and he challenged his detention on Ellis Island by seeking a writ of habeas corpus.

Recognizing the power to exclude aliens as a sovereign prerogative largely immune from judicial review, the Court noted that Congress had authorized the President through the Attorney General to impose additional restrictions on the entrance of aliens "during periods of international tension and strife." *Id.* at 210. That authority allowed the Attorney General to exclude aliens on the basis of confidential information without a hearing; therefore, the lawfulness of Mezei's detention turned on the constitutionality of this authority. *Id.* at 210-11. Although aliens legally or illegally within the United States enjoy limited due process protections when the government seeks to expel them, the Court distinguished their circumstances from those of an excluded alien who, even if paroled into the United States, remains at the threshold of initial entry by operation of law. *Id.* at 212-13. For such aliens, Congress defines all the process that is due. *Id.* at 212. Because executive action under this authority is final and conclusive, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government." *Id.* That Mezei remained indefinitely detained at Ellis Island, in the Court's estimation, did not alter his status as excludable or deprive him of any statutory or constitutional right. *Id.* at 215-16. Finally, the national security implications of Mezei's case justified a higher degree of caution than the typical case in which the Attorney General releases a resident alien pending proceedings to effect deportation. *Id.* at 216.

On the authority of *Mezei*, most courts have had little trouble turning aside habeas petitions brought by Mariel Cubans or other excludable aliens facing the prospect of indefinite or extended detention, albeit

reaching this result with some variations in their reasoning. Some courts have construed the INS's Mariel regulations as establishing a series of one-year periods of detention followed by an opportunity to seek immigration parole. *E.g.*, *Barrera-Echavarria*, 44 F.3d at 1450. Other courts have deferred to the plenary power of the Congress to regulate immigration and of the President to conduct foreign affairs. *E.g.*, *Carrera-Valdez*, 211 F.3d at 1047-48. As for substantive due process, courts have found both that indefinite detention does not constitute punishment because of the government's underlying legitimate interest in protecting its citizens, *Gisbert*, 988 F.2d at 1442, and that Congress, not the Fifth Amendment, defines the extent of protections for excludable aliens, who after all are not—as a matter of law—within the United States. *Guzman*, 130 F.3d at 66; *Palma*, 676 F.2d at 103 (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). Additionally, these courts have ruled that the Immigration and Nationality Act ("INA"), the INS's Mariel regulations, and the Supreme Court's decision in *Mezei* all displace international law. *E.g.*, *Guzman*, 130 F.3d at 66. As one court summarized the view of the majority of circuits:

> [C]ase law holds there is no constitutional impediment to the indefinite detention of an alien with a criminal record under a final order of exclusion, deportation, or removal if (1) there is a possibility of his eventual departure; (2) there are adequate and reasonable provisions for the grant of parole; and (3) detention is necessary to prevent a risk of flight or a threat to the community.

Chi Thon Ngo, 192 F.3d at 397.

Until recently only the Tenth Circuit had departed from the position taken by the majority of circuits in reliance on *Mezei*. In *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (2-1 decision), the court considered the habeas petition of a Mariel Cuban at a time prior to promulgation of the Mariel regulations or the enactment of statutory authority for the Attorney General to detain an excludable alien indefinitely in section 1226(e). There, the Attorney General classified Rodriguez-Fernandez as suitable for immigration parole, but nonetheless continued his detention based on a governmental stay of all parole releases pending review of the entire situation created by the Mariel exodus without making an individualized determination of whether parole of Rodriguez-Fernandez was practicable or possible. Construing the applicable statute as authorizing only temporary detention for a reasonable period to negotiate and effect deportation, the court sought to avoid what it considered serious constitutional problems by deciding the case on an interpretation of the INA. *Id.* at 1386, 1390. Declining to draw a distinction between excluded aliens, regarded as standing at the border, and resident aliens, *id.* at 1387 n.3, the court ruled that excluded aliens enjoy the full protections of the Fifth Amendment:

> Thus, it would appear that an excluded alien in physical custody within the United States may not be "punished" without being accorded the substantive and procedural due process guarantees of the Fifth Amendment. Surely Congress could not order the killing of Rodriguez-Fernandez and others in his status on the ground that Cuba would not take them back and this country does not want them

> . . . . Certainly imprisonment in a federal prison of one who has been neither charged nor convicted of a criminal offense is a deprivation of liberty in violation of the Fifth Amendment, except for the fiction applied to these cases that detention is only a continuation of the exclusion.

Id. at 1387 (footnote omitted). Further, the court did not regard *Mezei* as controlling because of the particular facts presented there, namely the national security risks attending the Korean War and the government's continuing efforts to deport *Mezei*. *Id.* at 1388. Because of the serious constitutional issues lurking in the background, the court preferred to decide Rodriguez-Fernandez's petition on statutory grounds. *Id.* at 1389-90.

Subsequent promulgation of the Mariel regulations and Congress's enactment of former section 1226(e) in the Immigration Act of 1990 have abrogated the Tenth Circuit's holding in *Rodriguez-Fernandez*. Not only have several other circuits so recognized, *e.g.*, *Carrera-Valdez*, 211 F.3d at 1048, but the Tenth Circuit itself recently disavowed the constitutional analysis of *Rodriguez-Fernandez* as dicta on this basis. *Ho*, 204 F.3d at 1057.

3. Rosales-Garcia

In *Rosales-Garcia v. Holland*, 238 F.3d 704 (6th Cir. 2001) (2-1 decision), this court reversed the district court's denial of a habeas petition brought by a Mariel Cuban.[5] After concluding that former section 1226(e)

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[5] Prior to the decision in *Rosales-Garcia*, this circuit had upheld the constitutionality of indefinite detention only in unpublished opinions of no precedential value. See *Garcia-Arena v. Luttrell*, No. 99-6505, 2000 WL 1827855 (6th Cir. Dec. 8, 2000);

expressly granted the Attorney General the authority to detain an excludable alien indefinitely, *id.* at 715-16, the court discounted the government's reliance on *Mezei* for two reasons. First, the court recognized that the Supreme Court had subsequently extended "to aliens basic Fifth, Sixth, and Fourteenth Amendment protections." *Id.* at 719. Second, the court limited Mezei to its facts by emphasizing the national security aspect of the case and the background of the Korean War. *Id.* at 719-21. Based on this reading of *Mezei*, the court "emphatically reject[ed] the government's premise that excludable aliens are completely foreign to the Fifth Amendment of the Constitution." *Id.* at 721. Because the INS could neither execute nor torture an excludable alien constitutionally, the court declined "to draw a line of constitutional dimension between the act of torturing an excludable alien and the act of imprisoning such an alien indefinitely" because "aliens—even excludable aliens—are 'persons' entitled to the Constitution's most basic protections and strictures." *Id.*

Having then proceeded to the conclusion that the indefinite detention of an excludable alien violates the Due Process Clause of the Fifth Amendment, *id.* at 726-27, the court announced a test for determining whether the federal government's diplomatic efforts with an alien's home nation suffice to justify continued detention. *Id.* at 725. Notwithstanding the Tenth Circuit's

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Betancourt v. Chandler, No. 99-5797, 2000 WL 1359634 (6th Cir. Sept. 14, 2000); *Laetividad v. INS*, No. 99-5245, 1999 WL 1282432 (6th Cir. Dec. 27, 1999); *Fernandez-Santana* v. *Chandler*, No. 98-6453, 1999 WL 1281781 (6th Cir. Dec. 27, 1999); *Marrero-Montes v. United States*, No. 98-5378, 1998 WL 808255 (6th Cir. Nov. 10, 1998); *Gonzalez v. Luttrell*, No. 96-5098, 1996 WL 627717 (6th Cir. Oct. 29, 1996).

abrogation of its decision in *Rodriguez-Fernandez*, the court concluded by adopting the reasoning of that case in support of its holding:

> We agree with the Tenth Circuit that when an alien's home country refuses to accept him, it appears that "detention is [] used as an alternative to exclusion rather than a step in the process of returning petitioner to his native Cuba." *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386 (10th Cir. 1981); *cf. Chi Thon Ngo*, 192 F.3d at 398 ("It is [] unrealistic to believe that these INS detainees are not actually being 'punished' in some sense for their past conduct."). We conclude, therefore, that Rosales's detention has crossed the line from permissive regulatory confinement to impermissible punishment without trial.

Id. at 726-27. In short, *Rosales-Garcia* rests upon two critical assumptions: (1) the distinction in immigration law between excludable and deportable aliens has no constitutional significance; and (2) *Mezei* no longer controls the constitutional analysis of indefinite detention, at least for excludable aliens.

4. The Supreme Court's Decision in Zadvydas v. Davis

After this court decided *Rosales-Garcia*, the Supreme Court considered the constitutionality of the indefinite detention of resident aliens in *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001). Announcing that construction of an ambiguous post-IIRIRA statute to authorize indefinite detention would raise serious constitutional problems, the Court read 8 U.S.C. § 1231(a)(6) as limiting post-removal-period detention "to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 2498.

The Court reasoned that because the Due Process Clause of the Fifth Amendment applies to all persons within the United States, whether in the country legally, illegally, temporarily, or permanently, "[t]he serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without [adequate procedural protections] is obvious." *Id.* at 2500.

The statute before the Court in *Zadvydas*—section 1231(a)(6)—is not the statute at issue in this case. Interpreting section 1231(a)(6), the *Zadvydas* Court concluded that indefinite detention of a resident alien would pose serious constitutional problems, but carefully distinguished the situation of excludable aliens, whom the law regards as standing at—but outside—the border. At the outset of the opinion, the Court limited the issue before it so as to except excludable aliens from its analysis:

> We deal here with aliens who were admitted to the United States but subsequently ordered removed. *Aliens who have not yet gained initial admission to the country would present a very different question.*

Id. at 2495 (emphasis added).

When the Court discussed the constitutional principles guiding its decision, it discussed *Mezei* at length and concluded that the case offered the government no support. *Id.* at 2500-01. But, unlike *Rosales-Garcia* and *Rodriguez-Fernandez*, which read *Mezei* as a relic of the Cold War, the Supreme Court in *Zadvydas* affirmed the vitality of the case—at least for excludable aliens:

> Although *Mezei*, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect . . . . His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border." [*Mezei*, 345 U.S.] at 213, 215. And that made all the difference.

Id. at 2500. Turning to the fundamental difference in immigration law between excludable and deportable aliens, the Court recognized that this distinction has constitutional significance. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), and *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). Furthermore, "once an alien enters the country, the legal circumstance changes, for the Due Process clause applies to all 'persons' within the United States, including aliens . . . ." *Id.* at 2500-01 (citations omitted). Since the law regards excludable aliens as standing outside our borders, the Fifth Amendment can offer them no protections. [6]

Put another way, the Court in *Zadvydas* declined to extend the analysis of *Mezei*, which concerned the indefinite detention of an excludable alien, to aliens who

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[6] We do not, of course, mean to imply that the United States has license to torture or summarily execute excludable aliens. *See, e.g., Zadvydas*, 121 S. Ct. at 2505-06 (Scalia, J., dissenting) (concluding that while excludable aliens cannot be tortured or subjected to hard labor without a judicial trial, "neither prohibition has anything to do with their right to be released into the United States."); accord *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987) and *Rodriguez-Fernandez*, 654 F.2d 1382.

have already attained entry into the United States. For this reason, the *Zadvydas* Court recognized that *Mezei* embodies "a basic territorial distinction" that precluded the government from relying on the case when defending the constitutionality of the indefinite detention of resident aliens. *Id.* at 2501. Because the Court concluded that the status of an alien does have constitutional significance, it declined to entertain arguments that subsequent developments in the law had undermined the authority of *Mezei*. *Id.*

5. Application of the Sanders Standard

From the Supreme Court's discussion in *Mezei* of the constitutional principles implicated by indefinite detention of aliens, two things are clear. First, the Court regards the distinction between excludable and deportable aliens in immigration law as having constitutional significance. *Id.* at 2500-01. Moreover, from a constitutional perspective, everything turns on this distinction because once an alien enters the United States "the legal circumstance changes, for the Due Process Clause applies[.]" *Id.* at 2500. On this point the Court's opinion in *Zadvydas* is fundamentally at odds with this court's decision in *Rosales-Garcia*, which emphasized that "aliens—even excludable aliens—are 'persons' entitled to the Constitution's most basic protections and strictures" and which "emphatically reject[ed] the government's premise that excludable aliens are completely foreign to the Fifth Amendment of the Constitution." 238 F.3d at 721. Second, *Mezei* remains good law, and its principles continue to govern the constitutional analysis of the indefinite detention of excludable aliens. *Zadvydas*, 121 S. Ct. at 2495, 2500-01. This conclusion also conflicts with the position this court took in *Rosales-Garcia* limiting *Mezei* to its facts. 238

F.3d at 719-21. For these reasons, we conclude that our prior decision in *Rosales-Garcia* cannot survive the Supreme Court's decision in *Zadvydas* and that under the analysis of *Mezei* the Fifth Amendment does not present an obstacle to the potentially indefinite detention of an excludable alien.[7]

Even under the more generous standard of *Sanders* for determining whether a court can consider a second or successive petition for a writ of habeas corpus, Carballo, then, cannot establish that a change in the law has intervened so as to allow our consideration of his petition under the "ends of justice" component of the standard. Since the United States District Court for the Northern District of Texas previously rejected on the merits a petition asserting the same grounds for relief, the *Sanders* standard accords that petition preclusive weight. *Sanders*, 373 U.S. at 15; *Lonberger*, 808 F.2d at 1173.

V. Conclusion

Whether we apply the standard of *Sanders* or the gatekeeping provisions of the AEDPA, Petitioner's application for a writ of habeas corpus constitutes a second petition, and our consideration of it is barred. Therefore, we affirm the judgment of the district court.

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[7] We note that Justice Kennedy filed a dissent in *Zadvydas* in which he suggested that our decision in *Rosales-Garcia*, which he deemed to employ reasoning "remarkably similar to the majority's," "would seem a necessary consequence" of the majority's opinion. 121 S. Ct. at 2513 (Kennedy, J., dissenting). In light of the affirmation of *Mezei* and the Court's express disavowal in *Zadvydas* that its analysis in any way applied to excludable aliens, we respectfully disagree with Justice Kennedy's suggestion.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 98-286

MARIO ROSALES-GARCIA, PETITIONER

v.

J.T. HOLLAND, WARDEN, RESPONDENT

[Filed: May 3, 1999]

MEMORANDUM OPINION AND ORDER

This matter stands submitted before the Court for consideration of the petition of Mario Rosales-Garcia, pro se, for writ of habeas corpus, pursuant to 28 U.S.C. § 2241. The respondent has filed a response [Record No. 12], to which the petitioner has replied [Record No. 16].

BACKGROUND OF THE PETITION

On or about May 1, 1980, the petitioner came to the United States from Cuba during the Mariel boatlift. By May 20, he had been granted immigration parole into the United States and released from custody to the sponsorship of a relative in Miami, Florida [Response Exhibits (all hereinafter Ex.) at p. 1-2]. By the following October of 1980, the petitioner's lengthy

criminal history in the United States began with what became a series of arrests. Although the petitioner was placed on probation for the first infractions, later criminal activity resulted in several convictions and the imposition of sentences. His first conviction was in July 1981; later convictions in the 1980's included grand theft in 1983 and escape in 1985. His immigration parole was revoked on July 10, 1986. Ex. 6.

After a hearing before an immigration judge in Atlanta, Georgia, on June 26, 1987, the petitioner was found excludable and ordered excluded from the United States. Ex. 65-70.

The petitioner was approved for immigration parole for a second time on April 22, 1988, and was released on May 20, 1988. However, he again engaged in criminal conduct and in 1993 was convicted of conspiracy to traffic in cocaine in the United States District Court for the Eastern District of Wisconsin. While serving his federal sentence, the INS lodged a detainer against him. On March 24, 1997, prior to his release scheduled for May, he was reviewed (Ex. 34) and the decision was made to revoke his second immigration parole and detain him in INS custody upon release from his sentence. Accordingly, upon his release in May of 1997, he was returned to the custody of the INS.

The INS conducted another review pursuant to the parole review procedures for Mariel Cubans at 8 C.F.R. § 212.12 in November of 1997, and on December 12, 1997, the INS Associate Commissioner for Enforcement denied the petitioner immigration parole. His decision (Ex.131-32) noted the petitioner's recidivist criminal behavior when twice previously granted immigration parole into the United States and concluded that the Commissioner was unable to conclude that

petitioner would not violate again or would not pose a threat to the community. See Ex. 129-43. This decision was served on the petitioner on February 11, 1998.

BACKGROUND OF THE CASE

On July 9, 1998, Rosales-Garcia filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. He challenges the March 24, 1997, decision to revoke his prior parole and his continued detention as being (1) in violation of his Fifth Amendment due process rights, including a right to assistance of counsel, a prior opportunity to review information which would be considered at his hearing, and his right to confront and cross-examine a witness who would provide such information; (2) contrary to INS governing regulations, 8 C.F.R. § 212.12-.13; and (3) based on a point score violative of his rights under 28 U.S.C. § 609(b) and U.S.S.G. A1.2(e)(1) because the score includes points for prior convictions which were both extremely old, 1983 and 1986 convictions, and which involved extremely short sentences. He attached a two-page memorandum of law to the petition.

On October 1, 1998, the Court dismissed the petition, *sua sponte*, concluding that the petitioner's due process rights were not grounded in the Constitution and the Cuban Review Panel's rules and regulations and other authority cited by the petitioner also did not entitle him to the due process safeguards or results he asserted [Record No. 3]. The petitioner then filed a motion to alter and amend [Record No. 5], stating that the due process he intended to argue was not that arising under the Constitution but under 8 U.S.C. § 1101, § 1105a and the provisions of 5 U.S.C. § 551-701, *et seq.*, as well as well-known Supreme Court precedents. Noting its obligation to liberally construe the pro se submissions,

the Court vacated its earlier decision and ordered [Record No. 6] a response to the petition.

RESPONSE

In the response [Record No. 12], the respondent first contends that this Court's initial dismissal was correct and that the petitioner's contentions since that time do not require a different result. He asserts that the petitioner has failed to distinguish his claims from those already rejected by the courts, including the Sixth Circuit, in a case attached to the response, *Gonzalez v. Luttrell*, 100 F.3d 956, 1996 WL 627717 (6th Cir.1996) (Table, unpublished) (affirming the decision from the Eastern District of Kentucky, the Honorable Jennifer B. Coffman, presiding) [Attachment (all hereinafter Att.) No. 1]. In March and November of 1997, the petitioner received the regulatory review for parole, was appropriately denied in the discretionary authority of the Attorney General, and will continue to receive the annual reviews called for under 8 C.F.R. § 212.12(g)(2).

The respondent begins his legal arguments with the caution that judicial review of immigration matters is extremely limited, the power to exclude aliens being a fundamental sovereign attribute exercised by political branches, citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Therefore, historically the courts have accorded deference in these matters, the respondent citing to numerous cases in various circuits. He also points to recent legislation which has further limited judicial review, most recently in the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[1]

As to the petitioner's specific arguments, the respondent contends that the petitioner has no entitlement to parole or the due process safeguards he lists. He again relies on the old *Kleindienst* and *Mezei* cases and multiple cases since that time, holding that an alien seeking admission to this country, even temporarily, has no constitutional rights regarding his application. Nor is there any other source from which an enforceable liberty interest, hence due process rights, would flow. Aliens have only those rights which have been extended to them; Congress has placed aliens' parole in the total discretion of the Attorney General in 8 U.S.C. § 1182(d)(5)(A); detention of aliens by the Attorney General is also specifically provided for under other statutes; and 8 C.F.R § 212.12 sets out what process is due. The respondent contends that the instant petitioner receives all the process he is due so long as he receives the procedures contained therein on an annual basis and that the petitioner's cited cases to the contrary are distinguishable.

The respondent also refutes the petitioner's contention that he is entitled to the adversarial process in the revocation of his parole. Such is not required by the Constitution; the regulatory process, 8 C.F.R. 212.12, which has been upheld in previous constitutional challenges; or the statutes relied upon by the petitioner. Finally, the respondent urges that the petitioner has failed to show an abuse of discretion, not only legally,

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[1] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Sept. 30, 1996, Pub. L. 104-208, 110 Stat. 3009.

but also factually, when the record includes the petitioner's admitted criminal acts; his later violations of conditions of parole; his reviews under the regulatory procedures; and the Commissioner's use of pertinent factors and conclusions.

REPLY

The petitioner has filed a reply [Record No. 16] in which he repeats and expands on his prior arguments. In addition to claiming that aliens have the asserted procedural due process rights, he contends that the action of the Attorney General in revoking and/or denying him parole constitutes an arbitrary abuse of governmental power, in violation of his substantive due process rights. He submits that certain 1998 and 1999 cases from other circuits support this argument.

DISCUSSION

Background

First, the Court, like the immigration laws themselves and the response herein, distinguishes the language used to differentiate between alien statuses legally. Those undocumented aliens arriving like the Mariel Cubans are immediately inadmissible or "excludable." Those excludable aliens who have been through proceedings and had an order of exclusion entered have been deemed "excluded." Neither have ever been admitted. An "entry fiction" provides that even if an excludable alien is physically present in the United States, legally he is considered to have been detained at the border and never effected entry into this country.[2] He may be allowed to physically enter

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[2] *See Barrera-Echavarria v. Rison*, 44 F.3d 144, 150 (9th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 976 (1995). At the time of

the country on parole initially, pending a later hearing on admissibility, or later, after a decision that he will not be admitted but removed. However, entry on parole is not an admission. Because he was inadmissible or excludable upon arrival, an alien, such as the instant petitioner, often retains the "excludable" descriptor in case law, even if he has been ordered excluded.

A brief historical perspective is also in order.[3] Approximately 125,000 Mariel Cubans arrived in this country in May of 1980, seeking admission. Except for those the U.S. government determined to pose a threat, such as those with serious criminal records or severe mental illnesses, for whom continued detention was ordered, the vast majority of the arrivals were released on immigration parole as excludable aliens pursuant to the usual procedures in 8 U.S.C. § 1182(d)(5). The petitioner was in this majority.

The United States' position then and now has been that Cuba is required, as a matter of international law, to take back its nationals who are denied admission here. In December of 1984, the United States and Cuba entered into "the migration agreement," wherein Cuba agreed to accept 2,746 detained Mariel Cubans at the

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Barrera-Echavarria and the time of this petitioner's exclusion proceedings, before the IIRIRA, there were distinctions between "exclusion" and "deportation" proceedings, but these are now all removal proceedings, set out in 8 U.S.C.§§ 1229 and 1229a (West Supp. 1998). "Removable" is now used for aliens who are inadmissible or "excludable," and for those admitted and then considered deportable. 8 U.S.C. § 1229a(e)(2) (West Supp.1998).

[3] The Court finds the historical discussion in *Padron-Baez v. Warden, FCI, Fairton*, 1995 WL 419799 (D.NJ 1995) (Not reported in F. Supp.) helpful and summarizes it briefly.

rate of 100 per month. These were specific persons who either had been kept in detention since arrival in 1980 or whose immigration parole had been revoked between 1980 and the 1984 agreement. Obviously, this agreement did not cover Mariel Cubans whose immigration parole was revoked and inadmissability determined after 1984, such as the instant petitioner. Nor have any subsequent agreements named him as one permitted to return.[4]

In the years after the 1984 agreement, subsequent parole revocations caused a growing number of Mariel Cubans to be detained in United States facilities. In December of 1987, the Attorney General created a new plan for reviewing them for a subsequent parole. The Cuban Review Plan (hereinafter "the Plan"), 8 C.F.R. §§ 212.12-.13, under which the petitioner's possible parole must be determined, has applied from 1987 to the present day, with minimal amendments. The regulations specifically provide that the procedures apply to all detained Mariel Cubans, those excludables and those

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[4] Among the attachments to the response is the declaration of Michael E. Ranneberger, Coordinator, Office of Cuban Affairs, in the United States Department of State, regarding immigration discussions with Cuban officials, beginning in 1980 and continuing to the present. Mr. Ranneberger states that in 1984, the two governments agreed to the return of 2,746 of the criminals who arrived from Mariel; as of February 1999, 1,400 of them have been returned. Since the 1984 agreement was not a final list, the officials have met periodically to discuss immigration matters, including the return of Cuban nationals convicted of serious crimes and ordered excluded. Further agreements were reached in 1994 and 1995; and the most recent round of talks took place December 4, 1998. Mr. Ranneberger describes these as sensitive diplomatic exchanges which he cannot reveal, but he can confirm that the return of such nationals remains under discussion between the two governments. Att. 3.

already ordered to be excluded (8 C.F.R. § 212.12(a)), and set out in detail the review procedures to be used. Most importantly, § 212.12(g) provides for a Mariel Cuban's consideration for parole initially when immigration parole is revoked and subsequently every year thereafter.

Jurisdiction of this Court

The Court begins with the issue of its authority to review the immigration parole decisions of the Attorney General. Contending that this Court lacks jurisdiction to review the discretionary parole decision(s) herein, the respondent cites to changes in judicial review wrought by the IIRIRA in several sections, including codifications at 8 U.S.C. § 1252, § 1231(h), and conflicting case law interpreting the issue to date. At most, the respondent suggests, the scope of habeas review, if permissible, is limited to constitutional and statutory issues.

The Court first notes that several provisions in 8 U.S.C. § 1252, which is entitled "Judicial review of orders of removal," reflect Congress' intention to place all authority in the Attorney General and divest this court of jurisdiction to review his decisions.[5] The Court

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[5] 8 U.S.C. § 1252(a)(2)(West Supp. 1998) contains two applicable provisions:

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(1) any judgment regarding the granting of relief under § 1182(h) . . .

(2) any other decision or action of the Attorney General, the authority for which is specified under this chapter to be in

also notes that 8 U.S.C. § U.S.C. 1226(e) (West 1998), entitled "Apprehension and detention of aliens," also now explicitly provides:

> (e) Judicial review
>
> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). Thereafter, 8 U.S.C. § 1231, entitled "Detention and removal of aliens ordered removed," contains a sweeping provision in subsection (h).[6]

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the discretion of the Attorney General, other than the granting of relief under § 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Also, at 8 U.S.C. § 1252(g), the statute provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

[6] 8 U.S.C. § 1231(h) (West Supp. 1998), reads as follows: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable

Whether viewed one by one or cumulatively, Congress' changes to immigration law contained in both the IIRIRA and the Antiterrorism and Effective Death Penalty Act ("AEDPA")[7], effective earlier in 1996, have whittled away at the judicial review available to aliens. However, do any one or all of these provisions strip this Court of its power to review under federal habeas corpus law? The Court of Appeals in this circuit initially rejected the argument that the new legislation had stripped the Court of this jurisdiction in *Mansour v. I.N.S.*, 123 F.3d 423, 425 (6th Cir. 1997). Presented with an alien seeking judicial review of a deportation order, the Court upheld the constitutionality of the provision barring direct judicial review of a final deportation order, 8 U.S.C. § 1105a(a)(10) (1996), under the rationale that "judicial involvement in the form of habeas review remains available." However, not having been presented with a habeas petition, it specifically reserved for another day the issue of the scope of review that remains available on a petition for a writ of habeas corpus. *Id.* at 426, n.3.

As the respondent notes, the cases are in conflict on the issue of the Court's jurisdiction after Congress' latest immigration amendments.[8] Obviously, the case

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by any party against the United States or its agencies or officers or any other person."

[7] Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Apr. 24, 1996, Pub. L. 104-132, 110 Stat. 1214.

[8] For additional discussions of whether the district courts retain habeas jurisdiction, after the statutory changes of AEDPA and/or IIRIRA, see *Ncube v. INS District Directors and Agents*, 1998 WL 842349 (S.D.NY 1998) (slip opinion at p.7-8); *Rusu v. Reno*, 999 F. Supp. 1204, 1210 (N.D. IL 1998); *Hermanowski v. Farquharson*, ___F. Supp. 2d___, 1999 WL 111520 (D. RI 1999), slip op. at *5.

law as to AEDPA and IIRIRA provisions will be developing over time. At this time, as the district court concluded in *Oliva v. INS*, 1999 WL 61818 (S.D. NY 1999), in the absence of further clarification from the Court of Appeals in this circuit or from the Supreme Court, this Court finds that it has jurisdiction to entertain a petition for habeas corpus under § 2241. *Id.* at *3. Therefore, the Court will examine all of the issues raised in the instant § 2241 habeas petition to determine if the petitioner is being held in violation of any laws of the United States.

Statutory Claims

The Court begins its analysis on the merits of the petitioner's claims with an examination of the overall immigration and naturalization scheme. Under the Constitution of the United States, control over such matters is vested in the political branches. U.S. Const. Art. I, § 8, cl. 4. Congress has granted total discretionary authority to the Attorney General in Title 8. Aliens and Nationality, Chapter 12-Immigration and Nationality, Subchapter 1, at 8 U.S.C. § 1103, which begins

> (a) Attorney General
>
> (1) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, that determination and ruling by the Attorney General with

> respect to all questions of law shall be controlling.

8 U.S.C. § 1103(a)(1) (West Supp. 1998). This statutory delegation of power and discretion to the Attorney General has been unchanged since its enactment in 1952. Included in this power is the decision whether to parole inadmissible or "excludable" aliens, contained in 8 U.S.C. § 1182.[9] It and the regulation governing reparoles, 8 C.F.R. § 212.5(d)(2), have been only minimally amended in recent years.[10] With some of the changes, the application of prior or later versions of some statutes matter little. See 8 U.S.C. § 1226.[11]

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[9] 8 U.S.C. § 1182(d)(5)(A)(1998), relied upon by the respondent, provides that the "Attorney General may . . . in [her] discretion parole into the United States temporarily under such conditions as [she] may prescribe only on a case-by-case basis for urgent humanitarian resons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

[10] The Court notes that 8 C.F.R. § 212.5 (1998) was last amended 63 FR 31895, June 11, 1998 and at subsection (d)(2)(i) it has been expanded to provide that for aliens whose parole had terminated or been terminated "[i]f the exclusion, deportation, or removal order cannot be executed by removal within a reasonable time, the alien shall again be released on parole unless in the opinion of the district director or the chief patrol agent the public interest requires that the alien be continud in custody." Subsection (f) referring Cuban nationals to 8 C.F.R. § 212.12 and .13, is unchanged.

[11] 8 U.S.C. § 1226(e)(1994), applying to aliens whose exclusion proceedings commenced prior to April 1, 1997, such as the instant

Other statutes, particularly those still relied upon by the petitioner, have undergone substantial change over recent years,[12] but that change is not in the petitioner's favor. The most recent of these changes were contained in the IIRIRA, which reorganized and amended immigration laws significantly,[13] particularly with regard to the Attorney General's detention of aliens.

Among the changes are specific provisions dealing with this petitioner's situation. In 8 U.S.C. § 1226, now entitled "Apprehension and detention of aliens," virtually every paragraph makes clear the Attorney General's power to detain excludable aliens. It begins with the Attorney General's power to arrest, detain, and then release excludable aliens, on bond or conditional parole, pending a decision on removal. 8 U.S.C. § 1226(a) (West 1998). The following subsection, (b), provides that the Attorney General may revoke parole and detain an alien "at any time." 8 U.S.C. § 1226(c). "Detention of criminal aliens," discussed *supra* at

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petitioner, required the Attorney General to take into custody an excludable alien convicted of an aggravated felony upon release of the alien from his criminal sentence. The current statute (West 1998), now entitled "apprehension and detention of aliens," provides a new subsection, (c), for criminal aliens' detention and possible subsequent parole; however, the Attorney General's obligation to take them into custody is the same.

[12] In addition to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Sept. 30, 1996, Pub. L. 104-208, 110 Stat. 3009, see the Immigration Act of 1990 ("IMMACT"), Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 5083; and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Apr. 24, 1996, Pub. L. 104-132, 110 Stat. 1214.

[13] Discussed in *Berehe v. INS*, 114 F.3d 159, 161-62 (10th Cir. 1997), and *Reno v. American-Arab Anti-Discrimination Committee*, __U.S. __, 1999 WL 88922 (Feb. 24, 1999).

footnote 11, explicitly requires the Attorney General to take aliens with criminal convictions into custody upon their release and permits release thereafter only as called for in the statute.[14]

Also, 8 U.S.C. § 1231 (West Supp. 1998), "Detention and removal of aliens ordered removed," provides that after an order of removal, the Attorney General has a 90-day removal period, in which to effect removal and, during that period, "the Attorney General shall detain the alien." Moreover, subsection (d)(1)(A), now specifically provides for prolonged detention "beyond the removal period," with no cap on the time limit to do so, if the excludable or one ordered removed "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." *Id.* at (a)(6).[15]

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[14] 8 U.S.C. § 1226(c)(2) (West 1998) provides as follows:

> The Attorney General may release an alien described in paragraph (1) only if [1] the Attorney General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* [2] the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien. (Emphasis added.)

[15] 8 U.S.C. § 1231(a)(6) (West Supp. 1998) provides in its entirety:

> (6) Inadmissible or criminal aliens

The petitioner contends he relies upon 8 U.S.C. § 1101, the definition section of the chapter. However, that statute does not support any argument of the petitioner and, in fact, specifically provides that immigration parole is not an admission to the United States in 8 U.S.C. § 1101(a)(13)(B) (West Supp. 1998). To the extent he relies upon 8 U.S.C. § 1105a, "Judicial review of orders of deportation and exclusion," it also is not applicable to his arguments about parole because the petitioner did not appeal the exclusion order against him."[16] The petitioner's current reliance on these statutes, together with his original reliance on the equally inapplicable 28 U.S.C. § 609(b) and sentencing guidelines, is unfounded. Also, the Administrative Procedures Act does not apply to immigration proceedings. *Ardestani v. INS*, 502 U.S. 129, 133 (1991).

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

[16] 8 U.S.C. § 1105a(a)(10) (West Supp. 1998) now reads: "Any final order of deportation against an alien who is deportable by reason of having committed [any of certain enumerated crimes characterized as an aggravated felony or a firearms offense] shall not be subject to review by any court."

To the extent the petitioner intends to rely on an earlier version providing that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings," (8 U.S.C. § 1105a(1)(10) (1995)), § 306(b) of the IIRIRA repealed the previous § 1105a, in its entirety, and replaced it with the current judicial review provisions of 8 U.S.C. § 1252, discussed *supra*, at p. [178a-179a].

The Court finds that the Attorney General's authority is not diminished by recent legislation. The Court also finds its conclusions in *Gonzalez v. Luttrell* and those of other courts, prior to any statutory changes, still apply. "Because an alien who has not been paroled must by definition be detained, and because Congress has certainly been aware that deportation cannot in all cases be immediately effected, it seems difficult not to conclude that the statutory scheme implicitly authorizes prolonged detention." *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1446 (9th Cir.), cert. denied, 516 U.S. 976 (1995).[17] Especially after the most recent immigration law changes, which provide for prolonged detention and set no time limits, the Attorney General may continue to detain the instant petitioner in conformity with federal law. *See Guzman v. Tippy*, 130 F.3d 64 (2nd Cir. 1997); *Perez-Diago v. True*, 1999 WL 51821 (D. KS 1999).

Constitutional Claims

The Court also finds no change in the law with regard to the petitioner's constitutional claims since its rejection of this contention in *Gonzalez v. Luttrell.*

The Sixth Amendment is not implicated, because "immigration proceedings and detention do not constitute criminal proceedings or punishment." *Ramos v. Thornburgh*, 761 F. Supp. 1258, 1260 (W.D LA 1991) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038

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[17] *See also Gisbert v. U.S. Attorney Gerneral*, 988 F.2d 1437, 1443 (5th Cir.), amended, 997 F.2d 1122 (5th Cir. 1993); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 960 (9th Cir. 1991), cert. denied, 506 U.S. 842, 113 S. Ct. 127 (1992); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986), all cited in *Gonzalzez v. Luttrell*, 100 F.3d 956 (6th Cir. 1996) (Table, unpublished).

(1984)). *Accord, In re Mariel Cuban Habeas Corpus Petitions*, 822 F. Supp. 192, 196 (M.D. PA. 1993); *Barrios v. Thornburgh*, 754 F. Supp. 1536, 1542 (W.D. OK 1990); *Sanchez v. Kindt*, 752 F. Supp. 1419, 1430-31 (S.D. IN 1990). "It has been recognized that excludable aliens are entitled to some protections under the Sixth Amendment. However, those protections are only available to those excludable aliens who face criminal prosecution." *In re Cuban*, 822 F. Supp. 192, 196 (M.D. PA 1993) (citing *U.S. v. Gavilan*, 761 F.2d 226 (5th Cir. 1985) (right to effective counsel)).

Nor does the Fifth Amendment to the Constitution provide excludable aliens with due process rights with regard to admission or parole. Aliens such as the petitioner enjoy only those rights which Congress extends. *Landon v. Plasencia*, 459 U.S. 32 (1982). *See also Pena v. Thornburgh*, 770 F. Supp. 1153, 1160 (E.D. Tex. 1991) (Mariel Cuban detainee "entitled to only the due process which Congress has provided to him"). This Court finds no basis for petitioner's assertion he enjoys a liberty interest in freedom from detention secured by the Due Process Clause of the Fifth Amendment. The Court finds no validity in the petitioner's contention that his liberty interests springs from other sources, such as the policy of parole in 8 C.F.R. §§ 212.12 or 212.5, public opinion, other even more vague sources. See the discussion of other sources, considered one by one, in *Sanchez v. Kindt*, 752 F. Supp. at 1427-1420; *see also Garcia-Mir v. Smith*, 766 F.2d 1478, 1451 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986).

In the petitioner's Reply [Record No. 16], he argues strongly that it is substantive due process which has been violated in his case; *i.e.*, his indefinite incarceration is an act of the government shocking to the conscience

of the Court and this Court should fashion an appropriate remedy. He cites not only to cases focusing on the importance of fundamental substantive due process rights, but also to a few 1998 and 1999 cases purportedly standing for the proposition that even excludable aliens have the right not to be subjected to an arbitrary abuse of governmental power.

While the law is clear that excludable aliens have only the procedural due process rights afforded by Congress, the law is less clear about the extent to which any substantive due process rights are enjoyed by excludable aliens. The case of *Gisbert v. U.S. Attorney General* denied the substantive due process claim of an excludable alien. 988 F.2d at 1447. *But see also Doherty v. Thornburgh*, 943 F.2d 204, 209 (2nd Cir. 1991) ("[T]he Supreme Court has questioned the extent to which aliens possess substantive rights under the Due Process Clause.").

The cases cited by the petitioner are clearly distinguishable.[18] More helpful cases are *Ncube v. INS District Directors and Agents*, 1998 WL 842349 (S.D. NY 1998) (slip opinion); and *Tam v. INS*, 14 F. Supp. 2d 1184 (E.D. CA 1998), which, although reaching different conclusions about inadmissible aliens' substantive due process rights, reflect the proper analysis. In con-

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[18] *Campos-Sanchez v. INS*, 164 F.3d 448 (9th Cir. 1999), found in favor of an alien with an expired visitor's visa because he had been denied an opportunity to present his testimony in violation of statute and regulations; *United States v. Wittgenstein*, 163 F.3d 164 (10th Cir. 1998), confirmed the criminal conviction of an alien for reentry into the United States after deportation; and *Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999), did not deal with aliens at all, but a state parolee who was reincarcerated because the state had made a mistake.

formity therewith, this Court finds that the instant petitioner has not presented a substantive due process claim. He has no fundamental right to be free to roam the United States and a fundamental right is the first component of a substantive due process claim. This Court also finds that, based on the petitioner's record, his continued detention is neither arbitrary, conscience-shocking nor oppressive in the constitutional sense and that this Court's intervention is inappropriate. Moreover, the Sixth Circuit has recently expressed the view that "[a]pplying the 'shock the conscience' test in an area other than excessive force . . . is problematic." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (quoting *Cassady v. Tackett*, 938 F.2d 693, 698 (6th Cir. 1991); *see also Pusey v. City of Youngstown, et al.*, 11 F.3d 652, 657 (6th Cir. 1993), cert. denied, 114 S. Ct. 2742 (1994). Therefore, the petitioner's substantive due process claim must also fail.

To repeat, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. at 544. Therefore, this Court examines the Attorney General's Cuban Review Plan, contained at 8 C.F.R. § 212.12-.13, as the due process which must be afforded the petitioner on an annual basis. *Gisbert*, 988 F.2d at 1443; *Rodriguez v. Thornburgh*, 831 F. Supp. 810, 813 (D. KS 1993). These detailed procedures still need not and do not comport with either the Fifth or the Sixth Amendment safeguards, which the petitioner asserts should have been afforded him, e.g., prior opportunity to review information against him, an opportunity to face and cross-

examine people who provide information, and/or right to counsel.

Rather, the Cuban Review Plan,[19] as previously discussed, calls for a detained alien to be considered for parole at least once per year. 8 C.F.R. § 212.12(g)(2). Therefore, the petitioner's characterization that his detention has been for an indefinite period of time is misleading. To the contrary, he has had and will continue to have an opportunity on an annual basis to show that since the prior review he would no longer constitute a danger to society if paroled. His detention is not indefinite but is for only one year at a time; at the end of each year he has an opportunity to plead his case anew. *Barrera-Echavarria*, 44 F.3d at 1450.

In each review for parole consideration, both initially and annually every year thereafter, the Plan lists specific factors which must be taken into consideration, including the detainee's past history of criminal behavior, and certain criteria which must be met, including conclusions that the detainee is nonviolent, not likely to violate parole conditions, and not likely to be a threat to the community. *Id.* at (d)(2) and (d)(3). The

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[19] The overall framework of the Plan places the discretion of the Attorney General in an Associate Commissioner for Enforcement ("the Commissioner") or his designate. 8 C.F.R. § 212.12(b). If his decision is to continue to detain the alien, he must set forth the reasons; and if his decision is to grant parole, he may impose appropriate conditions. *Id.*; see subsection (f) for required and acceptable conditions. To carry out his duties, the Plan calls for appointment of a Director, who is to maintain files and designate panels to make parole recommendations to the Commissioner. *Id.* at (c). The panels consist of two INS professionals; if the two members are split as to a recommendation, a third member is added and a majority determines the recommendation. *Id.* at (d)(1).

procedures begin with a review of the detainee's file by either the Director of the Cuban Review Plan or a panel. 8 C.F.R. § 212.12(d)(4)(i). If parole is not recommended, then the alien is entitled to a personal interview by a panel. *Id.* at (d)(4)(ii). At this interview, the alien may have someone accompany him, and he may submit any oral or written information he wishes. *Id.* The panel issues a written recommendation, including a brief statement of the factors it deemed material, to the Commissioner, who will consider it, together with the file material, in the exercise of the discretion granted her/him at 8 C.F.R. § 212.12(b). *Id.* at § 212.12(d)(4)(iii). These procedures have withstood constitutional challenges many times and this Court is in accord with the rationale in *Gisbert v. U.S. Attorney General*, 988 F.2d at 1442-44.

The remaining question is whether the instant petitioner was given the process he was due. Government exhibits reveal that the instant petitioner was considered for parole upon release from his federal sentence and was reviewed again before the end of that calendar year. In each review, pursuant to 8 C.F.R. § 212.12, he received consideration by panel members; personal interviews; specific findings with regard to the relevant factors and criteria; and written decisions, in Spanish and English, showing the reasons for the decisions to deny him parole. Regardless of the complained of point count contained in the first panel's recommendation (Ex. 34), the parole decision was made by the designated commissioner, who has the discretion to accept or reject the recommendation.

Therefore, the petitioner's claim that his confinement is in contravention of his due process rights will be dismissed. Consistent therewith and in consideration of

statutory amendments, this Court finds no violation of federal immigration law or of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court concludes that the petitioner has not demonstrated that he is being held in custody in violation of the Constitution or laws or treaties of the United States. Accordingly, the Court being advised, IT IS ORDERED that the petition of Mario Rosales-Garcia for writ of habeas corpus is DENIED and judgment shall be entered contemporaneously with this memorandum opinion in favor of the respondent.

This 3rd day of May, 1999.

/s/ KARL S. FORESTER
KARL S. FORESTER, JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 98-286

MARIO ROSALES-GARCIA, PETITIONER

v.

J.T. HOLLAND, WARDEN, RESPONDENT

[Filed: May 3, 1999]

JUDGMENT

In accordance with the Memorandum Opinion and Order entered contemporaneously with this Judgment, the Court hereby ORDERS AND ADJUDGES:

(1) Judgment IS ENTERED in favor of Warden J. T. Holland;

(2) this matter IS DISMISSED WITH PREJUDICE;

(3) this judgment IS FINAL and appealable, and no just cause for delay exists;

(4) the Court CERTIFIES that any appeal would be taken in good faith; and

(5) this matter IS STRICKEN from the active docket.

This 3rd day of May, 1999.

/s/ KARL S. FORESTER
KARL S. FORESTER, JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 98-3081 G/A

REYNERO ARTEAGA CARBALLO,
PETITIONER

v.

MARK LUTTRELL, ET AL.
RESPONDENTS

ORDER DENYING
REYNERO ARTEAGA CARBALLO'S PETITION FOR WRIT OF HABEAS CORPUS

Before the court is Reynero Arteaga Carballo's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Carballo, a convicted felon, is a citizen of Cuba who arrived in the United States during the 1980 Marial [*sic*] boatlift. In the present motion, petitioner challenges both his continued detention as an excludable alien and the Immigration and Naturalization Service's ("INS") refusal to grant him discretionary immigration parole. Because the court finds that petitioner has previously had the opportunity to fully litigate the issues raised in the present petition, the court denies Carballo's petition for habeas relief.

Petitioner came to the United States in May 1980, as part of the Marial [*sic*] boatlift, a group of 125,0000 undocumented Cuban aliens many of who admitted to criminal activity in Cuba. Cuba intially refused to accept the return of any Marial [*sic*] Cubans, and upon their arrival in the United States, all but a very few were released on immigration parole. To date, only a few Marial [*sic*] aliens have been repatriated.

Petitioner was on parole when, on April 25, 1983, he was convicted of attempted murder in the first degree, aggravated assault with deadly weapon, and robbery. He was sentenced to eight years imprisonment for attempted murder, eight years for robbery, and five years for aggravated assault. (Resp. Ex. A at 95-120). The record further indicates that during the time petitioner was on immigration parole (approximately May 1980–April 1983), he was arrested sixteen times. (*Id.* at 25–95). At various times, petitioner was arrested for grand larceny, forgery, possession of burglary tools, trespassing, possession of marijuana, resisting arrest with violence, battery, burglary, possessing stolen property, possessing weapons to commit a felony, strong arm robbery, and homicide. (*Id.*).

On November 25, 1983, as a result of April 23, 1983 convictions, petitioner's immigration parole was revoked and a notice was issued charging petitioner with excludability as an alien convicted of crimes involving moral turpitude. (*Id.* at 128). The INS initiated exclusion proceedings against petitioner on February 14, 1994. (*Id.* at 132-34). After a hearing on September 27, 1994, an immigration judge rendered petitioner excluded on grounds that petitioner did not possess a valid visa or other entry document, had been convicted of a crime involving moral turpitude, and had been

convicted of two or more offenses for which the aggregate sentence of confinement actually imposed was five years or more. (*Id.* at 136). Consequently, after petitioner completed his term of imprisonment, he was transferred to the custody of the INS. Consistent with the Cuban Parole Review Plan, 8 C.F.R. § 212.12, petitioner's case has been regularly reviewed for possible parole (approximately annually), most recently on March 23, 1998. Because of petitioner's lengthy criminal record, his continued disciplinary problems while in custody, and his "apparent disregard" for the significance of his criminal history, parole has been denied in each instance. (Def. Ex. D).

On September 6, 1990, petitioner filed his first petition for habeas relief in the United States District Court for the Northern District of Texas. (Def. Ex. A at 283–307). That petition was referred to Magistrate Clinton E. Averitte who reviewed petitioner's case and issued a report and recommendation on the petition on October 4, 1991. (*Id.* at 308–15). After completing her own review of the record, United States District Judge Mary Lou Robinson adopted Judge Averitte's recommendation and denied petitioner's first petition on November 25, 1991. (*Id.* at 317–18).

Respondent initially argues that this court should not review the merits of petitioner's petition because petitioner has already had the opportunity to litigate these issues in the Northern District of Texas. Respondent contends that the present petition is successive and consequently, barred either by principles of res judicata, law of the case doctrine, or abuse of the writ jurisprudence. The court finds that, in the present case, the law of the case doctrine prevents it from hearing

petitioner's claims.[1] Under the doctrine of the law of the case, "a decision on an issue made by a court at one stage of a case should be given effect in successive stages." *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990), *citing Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). This doctrine applies with "equal vigor" to the decisions of a coordinate court in the same case as to a court's own decisions. *Id.* Importantly, the doctrine of law of the case, particularly as applied to decisions of coordinate courts, is discretionary, designed as a tool to promote judicial efficiency. "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances." *Christianson*, 486 U.S. at 816, *quoting Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *see also In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664

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[1] The court observes that principles of res judicata do not apply to habeas corpus cases. *See Sanders v. United States*, 373 U.S. 1, 8 (1963). Further, while there is some support for respondent's proposition that abuse of the writ jurisprudence should apply to bar consideration of petitioner's § 2241 petition, *see Chambers v. United States*, 106 F.3d 472,474–75 (2d Cir. 1997); *Leyva v. Meissner*, 996 F. Supp. 831, 834–35 (C.D. Ill. 1998); *Byrd v. Gillis*, No. Civ. A 97-4697, 1997 WL 698157, at *1 (E.D. Pa. Nov. 5, 1997); *Sinclair v. Jenkins*, No. 93–3301–RDR, 1996 WL 511790, at *1 (D. Kan. Sept. 6, 1996), recently codifications of abuse of the writ law of Congress have noticeably omitted § 2241 petitions from their coverage. *See* 28 U.S.C. 2244 (imposing restriction on successive petitions challenging confinement pursuant to state court judgement); 28 U.S.C. § 2255 (imposing restrictions on successive petitions challenging confinement pursuant to a judgment of a federal court.). Additionally, respondent has failed to bring to the court's attention any decision by a court of this circuit applying abuse of the writ principles to a § 2241 petition.

F.2d 114 (6th Cir. 1981). In the Sixth Circuit, the determination of whether a prior ruling of a coordinate court should be reconsidered is left in the sole discretion of the court. *Todd*, 920 F.2d at 403. In making its determination, a court should consider whether substantially different evidence has been uncovered; whether a contrary view of law has been decided by controlling authority; or whether the earlier decision was clearly erroneous and would work manifest injustice. *Billups v. Schotten*, 145 F.3d 1329, 1998 WL 246440 (6th Cir. 1998), *citing Hanover v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997); *see also United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994).

Numerous courts have recognized successive habeas petitions as successive stages of the same litigation. *See e.g. Burton v. Foltz*, 810 F.2d 118, 119–20 (6th Cir. 1987); *Raulerson v. Wainwright*, 753 F.2d 869 (11th Cir. 1985); *Lackey v. Scott*, 885 F. Supp. 958, 960–63 (W.D. Tex. 1995). In the present petition, petitioner argues that his continued detention and parole denials violate his expectation of freedom from unreasonable detention, his procedural due process protections, and customary international law. These are precisely the same claims petitioner raised in his 1990 habeas petition before the United States District Court for the Northern District of Texas. Indeed, the two petitions differ by only a few words. The District Court for the Northern District of Texas, a coordinate court, gave petitioner's first petition careful consideration, issuing a detailed recommendation and opinion. In the present petition, the petitioner has made no allegation that there has been any change in fact or law that should alter the out come of his first petition or even that the 1991 decision was manifestly unjust. Consequently, law

of the case doctrine prevents this court from reconsidering petitioner's entirely repetitive claim.

Accordingly, petitioner's petition for habeas corpus relief is DENIED. That court further notes that petitioner's motion for appointment of counsel, also presently pending before the court, shall be dismissed as moot in accordance with this order.

IT IS SO ORDERED.

/s/ JULIA SMITH GIBBONS
JULIA SMITH GIBBONS
UNITED STATES DISTRICT
COURT JUDGE

May 10, 1999
DATE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5698

REYNERO ARTEAGA CARBALLO,
PETITIONER-APPELLANT

v.

MARK LUTTRELL, WARDEN; AND IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS-APPELLEES

Nov. 23, 2001

ORDER

Before: MARTIN, Chief Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

Pursuant to Sixth Circuit I.O.P. 35(c), a majority of Judges of this Court in regular active service have voted to grant the request of a member of this Court for rehearing of this case en banc.

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will schedule this case for oral argument as directed by the Court.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

APPENDIX H

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1182(d)(5)(A) of Title 8 of the United States Code provides:

> The Attorney General may * * * in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

3. Section 1231(a) of Title 8 of the United States Code provides in pertinent part:

Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

* * * * *

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien —

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

4. Section 212.12 of Title 8 of the Code of Federal Regulations provides:

Parole determinations and revocations respecting Mariel Cubans.

(a) *Scope.* This section applies to any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980 (hereinafter referred to as *Mariel Cuban*) and who is being detained by the Immigration and Naturalization Service (hereinafter referred to as the *Service*) pending his or her exclusion hearing, or pending his or her return to Cuba or to another country. It covers Mariel Cubans who have never been paroled as well as those Mariel Cubans whose previous parole has been revoked by the Service. It also applies to any Mariel Cuban, detained under the authority of the Immigration and Nationality Act in any facility, who has not been approved for release or who is currently awaiting movement to a Service or Bureau

Of Prisons (BOP) facility. In addition, it covers the revocation of parole for those Mariel Cubans who have been released on parole at any time.

(b) *Parole authority and decision.* The authority to grant parole under section 212(d)(5) of the Act to a detained Mariel Cuban shall be exercised by the Commissioner, acting through the Associate Commissioner for Enforcement, as follows:

(1) *Parole decisions.* The Associate Commissioner for Enforcement may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest. A decision to retain in custody shall briefly set forth the reasons for the continued detention. A decision to release on parole may contain such special conditions as are considered appropriate. A copy of any decision to parole or to detain, with an attached copy translated into Spanish, shall be provided to the detainee. Parole documentation for Mariel Cubans shall be issued by the district director having jurisdiction over the alien, in accordance with the parole determination made by the Associate Commissioner for Enforcement.

(2) *Additional delegation of authority.* All references to the Commissioner and Associate Commissioner for Enforcement in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Commissioner or Associate Commissioner for Enforcement to exercise powers under this section.

(c) *Review Plan Director.* The Associate Commissioner for Enforcement shall appoint a Director of the Cuban Review Plan. The Director shall have authority

to establish and maintain appropriate files respecting each Mariel Cuban to be reviewed for possible parole, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(d) *Recommendations to the Associate Commissioner for Enforcement.* Parole recommendations for detained Mariel Cubans shall be developed in accordance with the following procedures.

(1) *Review Panels.* The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

(2) *Criteria for Review.* Before making any recommendation that a detainee be granted parole, a majority of the Cuban Review Panel members, or the Director in case of a record review, must conclude that:

(i) The detainee is presently a nonviolent person;

(ii) The detainee is likely to remain nonviolent;

(iii) The detainee is not likely to pose a threat to the community following his release; and

(iv) The detainee is not likely to violate the conditions of his parole.

(3) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release on parole of a detainee:

(i) The nature and number of disciplinary infractions or incident reports received while in custody;

(ii) The detainee's past history of criminal behavior;

(iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;

(iv) Institutional progress relating to participation in work, educational and vocational programs;

(v) His ties to the United States, such as the number of close relatives residing lawfully here;

(vi) The likelihood that he may abscond, such as from any sponsorship program; and

(vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

(4) *Procedure for review.* The following procedures will govern the review process:

(i) *Record review.* Initially, the Director or a Panel shall review the detainee's file. Upon com-

pletion of this record review, the Director or the Panel shall issue a written recommendation that the detainee be released on parole or scheduled for a personal interview.

(ii) *Personal interview.* If a recommendation to grant parole after only a record review is not accepted or if the detainee is not recommended for release, a Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the Director. The detainee may be accompanied during the interview by a person of his choice, who is able to attend at the time of the scheduled interview, to assist in answering any questions. The detainee may submit to the Panel any information, either orally or in writing, which he believes presents a basis for release on parole.

(iii) *Panel recommendation.* Following completion of the interview and its deliberations, the Panel shall issue a written recommendation that the detainee be released on parole or remain in custody pending deportation or pending further observation and subsequent review. This written recommendation shall include a brief statement of the factors which the Panel deems material to its recommendation. The recommendation and appropriate file material shall be forwarded to the Associate Commissioner for Enforcement, to be considered in the exercise of discretion pursuant to § 212.12(b).

(e) *Withdrawal of parole approval.* The Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or any other circum-

stance, indicates that parole would no longer be appropriate.

(f) *Sponsorship.* No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States.

(g) *Timing of reviews.* The timing of review shall be in accordance with the following guidelines.

(1) *Parole revocation cases.* The Director shall schedule the review process in the case of a new or returning detainee whose previous immigration parole has been revoked. The review process will commence with a scheduling of a file review, which will ordinarily be expected to occur within approximately three months after parole is revoked. In the case of a Mariel Cuban who is in the custody of the Service, the Cuban Review Plan Director may, in his or her discretion, suspend or

postpone the parole review process if such detainee's prompt deportation is practicable and proper.

(2) *Continued detention cases.* A subsequent review shall be commenced for any detainee within one year of a refusal to grant parole under § 212.12(b), unless a shorter interval is specified by the Director.

(3) *Discretionary reviews.* The Cuban Review Plan Director, in his discretion, may schedule a review of a detainee at any time when the Director deems such a review to be warranted.

(h) *Revocation of parole.* The Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(1) The purposes of parole have been served;

(2) The Mariel Cuban violates any condition of parole;

(3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or

(4) The period of parole has expired without being renewed.